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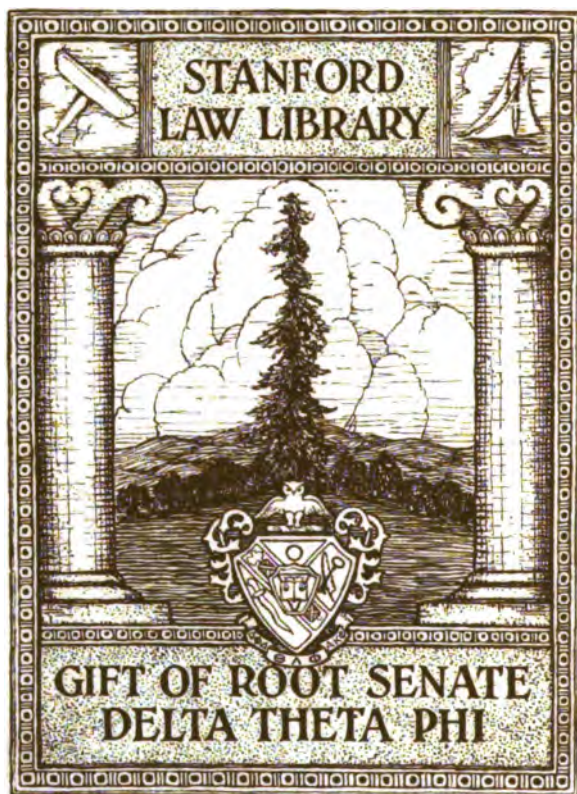
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LEON T. HANLEY

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AF
GF

A
SYSTEM
OF THE
Shipping and Navigation Laws
OF
GREAT BRITAIN:
AND OF THE 632!
L A W S
RELATIVE TO MERCHANT SHIPS AND SEAMEN;
AND
MARITIME CONTRACTS.

IN THREE PARTS:

- I. OF THE SHIPPING AND NAVIGATION LAWS.
- II. OF MERCHANT SHIPS AND SEAMEN.
- III. OF MARITIME CONTRACTS.

TO WHICH IS ADDED,

AN APPENDIX
OF THE NEW NAVIGATION LAWS, REGISTRY ACTS,
COMMERCIAL FORMS, &c.

BY FRANCIS LUDLOW HOLT,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

SECOND EDITION:
WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

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1824.

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TO THE
RIGHT HON. WILLIAM LORD STOWELL,

JUDGE OF THE HIGH COURT OF ADMIRALTY

Of England,

AND A LORD OF TRADE AND PLANTATIONS,

&c. &c. &c.

MY LORD,

IN soliciting your Lordship's protection to a Work on the Shipping and Navigation Laws of Great Britain, I consider myself as applying to one, whose administration of the more important of these laws, in the most critical period of our national existence, has so connected his name with these elements of our safety and greatness, as to have rendered the subject of the present Treatise almost peculiarly his own.

It is only a few years since this country concluded a war fertile beyond all others in the variety of its events; and which, whilst it continued, required a system of maritime jurisprudence peculiarly adapted to its new forms. The frequent

resort to the Admiralty Court in cases connected with belligerent and neutral rights carried almost every British merchant before that tribunal; and as its jurisdiction comprehends the principal subjects relating to the Navigation and Shipping Laws, the experience of the wisdom and equity of this Court, under your Lordship's administration, gradually attracted the most important cases within its compass. In the determination of all these cases, your decisions, my Lord, and the principles upon which they proceeded, so united the equity of the Civil Courts with the necessary exactness and precision of the Common Law, that when any of your decrees, as sometimes happened, were incidentally brought before the Courts at Westminster, I know not a single instance in which they were disputed by the Judges; whilst I remember many, in which the late Lord Chief Justice of the King's Bench (a man whom we must all lament) expressed in his strongest language, and most characteristic manner, his warmest and entire concurrence in your decisions, and the principles which guided them.

To those who write in the English language, and upon a subject rather local, as respects the interests of their own country, it may appear an unreasonable expectation to indulge any hope of attention from learned foreigners. Upon this part of the subject, every future writer must acknowledge

It is not the least portion of the obligations which they owe to your Lordship, that your judgments have rendered the **REPORTS** of **SIR CHRISTOPHER ROBINSON**, a book in the library of every foreign lawyer; and have thereby given to the Continent a knowledge and interest in subjects, which would otherwise have been confined to ourselves. Under this diffusion of the principles of our maritime law, it is no longer a vain hope that an English lawyer may be read abroad. In learning, in eloquence, in the condensation of strong sense in language exact and apposite, without quaintness and obscurity; in knowledge of the practices of life and character, in divesting subjects of all that is merely formal, technical, and artificial, and grounding them upon their proper and natural principles, and their due strength in right reason—your judgments, my Lord, have done for your own country, what the writings of Grotius, Vinnius, and Montesquieu, have done for France, Holland, and Germany. And it will no longer be said, that England has not contributed her share both to the practical illustration of the law of nations, and to that general maritime law which, under the name of the **Law Merchant**, is no less the law of single countries, than the public mercantile code of Europe.

The above are the public reasons for addressing this Treatise to your Lordship; and I beg

leave to add, that if I had known nothing more of LORD STOWELL, than his public reputation, and had seen nothing of him but in his judgments, I should have taken the liberty to introduce this Work to the profession by the aid of his distinguished name. It is no small pride to me, my Lord, that in this respect private feelings concur with public duty, and that this opportunity is afforded me of expressing my gratitude for a consideration and kindness, which I need not be told that I owe more to your Lordship's courtesy, than to any merits of my own.

I have the honour to remain,

With the highest respect,

Your Lordship's

Most obliged and obedient Servant,

FRANCIS LUDLOW HOLT.

*Paper Buildings, Temple,
May, 1824.*

PREFACE

TO THE

SECOND EDITION.

THE reader will observe that the present Treatise, now comprised in one Volume*, is divided into three parts. The first part treats of the Shipping and Navigation Laws; in other words, of that system by which the maritime trade and commerce of the country are regulated, and which has become of the first importance to the professional lawyer and the merchant, since the general peace has restored these laws to their ordinary operation, and removed the unnatural state which the necessities of the late war had induced.†

In the first part, the following subjects are discussed:—

1. The Origin and Policy of the Laws of Shipping and Navigation, &c.—2. The Plantation or Colonial Trade.—3. The Trade with Asia, Africa, and America, not being Colonial, &c.—4. The European Trade.—5. The Coast-ing Trade.—6. The Fisheries.—7. The Registry Acts.—8. Seizures and Forfeitures for the breach of the Navigation Laws, Registry Acts, &c.

* First printed in Two Volumes.

† On account of the great changes made in these laws by the recent statutes, the *first* part of this Work has been almost wholly rewritten.

In discussing these subjects respectively, the Author has first considered the several acts of Parliament by which they are regulated; he has then passed to the cases and decisions to which they have given rise; and concluded with a summary of RULES and EXCEPTIONS.

In this Treatise the Author has omitted every thing not strictly connected with his subject. Custom-house regulations, duties, drawbacks, and all the general details of trade, are not noticed, except incidentally, and very briefly, as they are not comprehended within the plan of the present Work. It became necessary, however, in discussing the trade with Asia, Africa, and America, to consider the constitution of the several trading companies now existing, and more particularly that of the East India Company. And in treating upon the European trade, a brief review of our commercial relations with other countries was thought expedient. But the Author has dispatched these subjects with as much brevity as was consistent with clearness and utility; insisting upon nothing but what is necessary to the practical lawyer and merchant, and what may operate in cases brought before our own courts of law.

The Chapter on the Registry Acts will perhaps be deemed disproportionately long: but the great importance of the subject, and the variety of the cases, rendered it necessary to go into detail, even to minuteness, on a subject upon which the property of shipping and the security of transfers so essentially depend. Since the late Registry Act, these cases are perhaps of less importance; but they could not be omitted with any propriety, as the principles of many of the decisions must be applicable to cases under the new system. The Chapter on Penalties and Forfeitures has been annexed, on account of the importance of the subject matter.

The second part of this Treatise, in which is discussed the law of Merchant Ships and Seamen, consists of seven Chapters. In this Part every subject is examined relating to owners, part-owners, and the title and interest in British shipping, whether acquired by building, purchase, mortgage or otherwise :—the qualifications and duties of masters, seamen, pilots, &c. ; of the power and authority of the master ; of hypothecation and bottomry ; and the sale of the ship, freight, or cargo, in cases of necessity. This Part treats likewise very fully of seamen's wages ; of the manner of earning them ; of the forfeiture of wages, and of suing for and recovering them. The several acts for the regulations of pilots and convoys are likewise treated in their order ; and the cases and decisions respecting Merchant Ships and Seamen, together with the acts of Parliament, are brought down to the time of the publication of this Treatise.

The third part treats of Maritime Contracts generally, with the exception of those which relate to marine insurance. It treats of charter-parties ; demurrage ; bills of lading ; of the duties of freighters, ship-owners, and masters ; of exceptions to the liabilities of owners under charter-parties ; of the common law extent of their responsibility ; and of the latitude given to their specific exemptions under the clause of exceptions of sea-perils, &c. It then passes to freight, lien, general average, stoppage *in transitu*, and salvage. Under each of these heads are respectively considered those principles and distinctions, in one or the other of which all the cases must fall. As far as the Author's labour and industry could succeed in accomplishing his purpose, he can undertake, he hopes without presumption to assert, that he has omitted no case whatever of any importance in the Admiralty or common law courts.

As the subject of the present Treatise, however laboriously and minutely it may be explained, is, in many parts, remote from general apprehension, and perhaps not very alluring as respects popular interest and curiosity, the Author has prefixed an **INTRODUCTION**, for the purpose of exhibiting a more brief and intelligible synopsis both of the reason and policy of the general system of our **Shipping and Navigation Laws**, and of those main and leading principles upon which the decisions of the courts have proceeded, in almost all the cases comprehended under the second and third parts of this Treatise. As respects this object, the proper character of the Introduction is, that it is the connected exposition and arrangement of the principles of the law of shipping and maritime contracts, disembarrassed from the cases; and if the Writer have in any tolerable degree effected his purpose in this part of his Work, the reader will possibly find a great body of law condensed into a small compass. It is trusted that the Appendix of Acts of Parliament, the Tables, and Indexes, will be found useful to the profession.

For the convenience of reference, and the accommodation both of the professional and mercantile reader, the present Treatise is printed in one Volume; the type employed being smaller, and the page larger, than in the former edition.*

* The First Edition was printed in two volumes octavo, January 1820.

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INTRODUCTION

TO THE

LAW OF SHIPPING AND NAVIGATION.

NAVIGATION LAWS.

IT will, perhaps, be readily admitted that, with the single exception of the soil, ships are the noblest property which any country can possess, being machines of national defence as well as instruments of wealth to individuals. It is from these considerations that this species of property has always been taken under the special protection of the law; and adopted, not less as the means of naval power, than of commercial prosperity.

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The comparative greatness of the British Empire is not, indeed, imputable to one cause only. A very considerable portion of it belongs to a system of religion which, on the one hand, is reformed from the superstitions of the Romish church; whilst, on the other, it maintains all those essentials of doctrine which are adapted, beyond all others, to the happiness of individuals and nations. Another portion belongs to our laws and constitution, in the liberty and protection of which every man finds equal encouragement in acquiring, as security in possessing. Another portion belongs likewise to our national habits and character; and, perhaps, in no inconsiderable degree, to that hereditary opinion of superiority, with which the

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meanest amongst us regards himself as a subject of the British empire. But the combined effect of all these causes is completed and crowned by our system of commerce ; and more especially by those laws which regulate our trade and industry, with a view of rendering them concurrent instruments of our national power.

It is as unnecessary to remind the living advocates of this system, as it would have been presumptuous to have reminded the illustrious founders of it, that the first principle of commerce is a perfect freedom of trade ; that in almost all cases it should be left to make and find its own way ; and that the best boon which legislators can bestow upon it, is to leave it unrestrained. The framers of our Navigation System, and those who have so ably maintained their doctrines in the present day, have as large, and certainly as just a comprehension of the nature of commerce, as those who have risen up in opposition to their principles. But they thought, and if we may judge from the effect, they thought justly, that nations as well as individuals had other and greater interests than mere present wealth ; that the first concerns of a great empire were its safety, its glory, and its national character ; and that, in comparison with these pursuits, commercial wealth was a subordinate object ; or, at least, that it derived its best value as means to those more important ends.

Under this consideration, they deemed it an enlarged prudence to tax our commerce for the sake of our public defence. They were aware that we might become richer under an unrestrained trade, than through a commerce however wisely regulated : but, as these regulations gave us a greater value in national defence than they subtracted from our immediate wealth, they conceived that they only sacrificed a less interest in pursuit of a greater. Hence our commerce has not been ignorantly yielded up to our navigation. Our Navigation System has not been adopted, as some have falsely asserted, as the means of advancing our commerce, but of maintaining and supplying the growth of our navy. And the effect has been what,

according to the experience of all nations, has always been the result of a large and generous prudence. Our navy, which was at first supported at the expense of our trade, and, in fact, rose principally out of its restrictions, has now liberally paid back the aid which it borrowed : and by conquering so large a portion of the most fertile part of the globe into the sphere of our commerce, and by holding together the numerous members and remote dependencies of the British empire, has given us a market which mere commerce of itself could never have acquired. In this manner have our commercial greatness, and our naval power, become intermixed as reciprocal means and ends. Without our navy, in the present state of the world, and amidst the jealousy of so many rival nations, it would be absurd to indulge a momentary expectation that our commerce could either attain the eminence it possesses, or could long support itself in that superiority. And, without the sources of our commercial wealth, it would be manifestly impossible that the country could support the concurrent burthen of a great military and naval establishment. So impolitic must be every attempt to sever those interests, and so unwise every view which regards them as independent and adverse ; because each is in a degree supported by a contribution from the other.

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Whatever limits a large expatiating principle is necessarily a subtraction from its immediate beneficial operation. But such principle is only adverse where it takes more than it gives ; where it imposes restrictions without any return of a greater, or at least equal good. But this is not the relation of our commerce and Navigation System. What it takes in restriction, it gives back in protection. What it takes in increased freight, (if, indeed, the effect of our Navigation Law does increase our freight,) it repays by enlarging the sphere of the supply of raw materials, and the market for manufactured goods ; by opening India, China and America to our shipping, and by maintaining and superintending the

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liberty of the intercourse of nations throughout the world. Without our navy, would our West India Islands supply the colonial consumption of America, as British colonies, or as American appendages? Without our commerce, could we have supported such a contest, as that but recently determined, for the common liberty of the continent and ourselves?

But, in the following Treatise on the Laws of Shipping and Navigation, it has occasionally become part of our duty to consider these questions as they arise; and, therefore, we shall here pass onwards to the more immediate subject matter of the present observations.

Division of our
Navigation
System.

The object of our Navigation System is to promote the increase of British shipping, by securing the demand and employment of it.—Its means, to this end, may be distributed under the respective heads;—the Colonial Trade; the trade beyond Europe not being colonial; the European Trade; the Coasting Trade; the Fisheries; and the Regulations for ascertaining the ownership and built of English ships, or, in other words, the Registry Acts.

So long as the interests of our Naval strength required a rigid adherence to this system, and so long as our commerce, from its actual character, did not suffer a greater loss from these regulations, than the enforcement of them imparted good to our navy, our Navigation System was inflexibly maintained; and the objections of our merchants were answered with the just observation, that as our agriculture itself paid to our revenue, so our commerce and manufactures must contribute to our national defence; and that it was better to possess a less extensive commerce, and a perfect national defence, than a greater trade, and a less effective navy. But when the gradual consequences of this restrictive system had raised our navy to a degree of strength adequate to our relation with other nations, and the Navigation Laws had thus in a great degree accomplished their object, the government and legislature then availed themselves of the opportunity of making some concessions in favour of commerce. It is under this

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change of circumstances, that our Navigation System has been from time to time relaxed and opened in favour of general trade. In the first Chapter of the following Treatise, in which the Navigation Laws are stated and discussed, we have pointed out the several changes and modifications which the system has recently undergone in all its branches. But, as the character of the body of our Work is too strictly legal to admit of any enlarged discussion of the political principles of the modifications of the Navigation System, our present purpose is to take a review of these gradual changes, and of that state of commercial and political relations under which they have originated.—In executing this inquiry, it will be necessary to take a view of our Navigation System as a whole, since the reason of the exceptions cannot be adequately understood without a deliberate attention to the nature and effects of the rule.

Colonial trade.

The first branch of our Navigation System respects the colonial trade; and this trade was anciently regulated by three rules, the effect of which was to confine this trade to British ships and mariners, and to give us a monopoly, both as to receiving the produce of the colonists, and as to transmitting their supplies. By the first of these rules (*a*), no goods could be imported into, or exported from, any colony in Asia, Africa, or America, but in British built ships, owned by British subjects, and navigated by a master, and three-fourths at least of the mariners, British subjects. By the second rule, no sugar, tobacco, or other enumerated goods, of the growth or production of any British colony, in Asia, Africa, or America, could be exported to any place whatsoever, but to Great Britain or Ireland. And as the first rule required all the trade to be in British ships, and the second rule secured to us the monopoly of colonial produce; so the third rule required that all the wants of the colonists should be supplied from Great Britain or Ireland only; this rule being in substance, that no European goods whatsoever

(*a*) 7 & 8 of W. 3. c. 22. and 12 Car. 2. c. 18.

Colonial trade. should be imported into the colonies, but direct from England or Ireland, and in British ships.

In the early state of our colonies, the monopoly of the mother country was very little felt. The demand of the home market was infinitely greater than the imperfect cultivation of the infant colonies could supply. Hence colonial produce procured as high a price as the colonists could desire. A larger market was not required for their exports. As little was it necessary to supply the limited wants of the new colonies. Under these circumstances, the double monopoly of the mother country, that of exports and imports, was in fact of little consequence to the colonies themselves. As far as respected every colonial interest, the effect of the colonial part of the Navigation System was almost a matter of indifference, whilst the monopoly in a great degree advanced and maintained the great public concern of our naval strength. Under this state of things, the government and legislature wisely adhered to a system, which contributed to the growth of our marine, whilst it impaired no visible good of our colonies.

But when the progress of our own colonies, and still more particularly the growth of all foreign settlements in the same seas, augmented the quantity of colonial produce beyond what was necessary for domestic supply ; and when a competition arose between our own islands and those of foreigners, to supply the markets of Europe and the United States, another policy became manifestly necessary. Our colonial planters could not enter into competition on equal grounds with foreigners, so long as their produce was to be sent first to England, and by such means burthened with the double freight of a voyage to Europe, and thence perhaps to the United States. Such a restriction necessarily pressed heavily upon our colonists. The extended cultivation of the islands, and their larger produce in consequence, gave indeed to these planters something of the character and consideration of British agriculturists ; and their condition under this increase was, that their produce was greater than they could sell within

the home market. It was therefore necessary for them to have access to a foreign market; and it was equally necessary to satisfy the reasonable claims of friendly States, who remonstrated against a monopoly now no longer justified by the circumstances of the time. In order to afford this relaxation thus required on both sides, the British government first resorted to the intermediate system of *free ports*, under the effect of which the colonies were in some degree laid open to the American market. This proceeding satisfied all parties during the continuance of the long French war; and paved the way for that entirely new system, which the experience of all parties, and the liberal feelings and knowledge of the present day, induced our government to adopt.

This system was at length established by the 3 Geo. 4. c. 43. 3 Geo. 4. c. 44. and the 3 Geo. 4. c. 45., by which the West Indies are almost thrown open to the commerce of the United States, and are permitted to export their produce direct to foreign Europe; and by which the trade between the Spanish provinces and the British empire is put nearly upon the same ground with the trade between Great Britain and any other foreign independent state.

The colonial law of Great Britain is now comprehended in these acts. Under the construction of these statutes, the colonial commerce is divided into two main parts: the trade between British America and the West Indies, and Foreign America and the Foreign West Indies; and the trade between British America and the West Indies, and all other parts of the world.

The rules of the first branch of our colonial trade may be briefly stated as follows:—1. That certain ports and places, that is to say, the principal port in all our West Indian Islands, and the seats of government in our American states, are to be regarded as open ports for trade and commerce with Foreign America and the West Indies. 2. That certain goods enumerated in a schedule appended to 3 Geo. 4. c. 44. (and which schedule comprehends almost all raw materials) may be imported into

Colonial trade.

any of the said open ports in British vessels, or in foreign vessels of the place of growth, &c. manned and navigated according to law; and may be so imported from any foreign West India Island, from Spanish Royal America, from Spanish Independent America, or from the United States.

3. That from all the said open ports, and in vessels British or foreign, it is lawful to export all the produce of the islands, or of British America, directly to the United States, or any foreign West Indian Island, or to Spanish America. 4. That all articles legally imported into any British West Indian Island or plantation, or any of the enumerated articles, may be re-exported from one West Indian Island to another, or from one settlement to another, in British vessels, or may be re-exported for any part of the United Kingdom in Europe. 5. Arms and naval stores are excepted, unless upon licence granted.

The rules of the second branch of our colonial trade, that is, of the trade between British America and the West Indies, and other parts of the globe, may be stated, with equal brevity, to be as follow. 1. All the produce of the colonies, and all goods legally imported into them, may be *exported* direct to any foreign port in Europe or in Africa, in British built vessels, manned and navigated according to law. 2. The same produce, and in the same vessels (namely, British built, &c.) may be imported from the colonies to Gibraltar, Malta, or its dependencies, or to Guernsey, Jersey, Alderney, or Sark. 3. All the goods and commodities enumerated in a schedule appended to the 3 Geo. 4. c. 45., that is to say, almost all raw and unmanufactured goods, may be *imported* into the said colonies from any foreign port in Europe or Africa, or from Gibraltar, Malta, Guernsey, Jersey, Alderney or Sark, in any British built vessel, manned and navigated according to law. 4. With respect to the East Indian Trade, it is expressly provided by treaty and Act of Parliament, that the citizens of the United States shall freely carry on a direct trade between America and the East Indies. 5. But that the United States shall not carry on

any coasting trade, along the shore of the British territories in the East Indies; and shall carry *direct* to some port in America, and not to Europe, whatever they shall receive as lading in the East Indies. Colonial trade.

Such is the state of the colonial trade as it at present exists; and such are the relaxations, which, in favour of a new state of things, the growth of our colonies, and the competition of foreign islands, have been introduced to qualify the rigour of the ancient system, and to conciliate as much as is possible the interests of our commerce and navy. But though the changed circumstances of the times have compelled the legislature to make these concessions, it is still to be observed that, in the very deviation from the rule, they have never forgotten the rule itself. They have always so qualified the exception as to restrain the indulgence granted within the necessity of the case. They have deviated only as gradually as was possible. They have in no instance made a total sacrifice of the fundamental principle of the subordinate importance of our commerce, when in immediate competition with our navy. The greatest inroad upon this system has undoubtedly been by the admission of a direct trade between the United States and our West India Islands: but the growth of our colonies rendered this concession necessary; and the consequence of refusing this relaxation would have been the entire surrender of the American market to the foreign West India islands. The lucrative trade of our colonies with the South American continent is equally necessary; and the permission of this trade by law has only placed upon a legal basis what before was an illicit traffic. The exportation of our rum by vessels engaged in this trade at once encourages the West Indian planter, and in no degree interferes with any interest of the merchant in the mother country. The provision and lumber trade is found to be an indispensable traffic; and it is certainly cheaply purchased by allowing a direct exportation of colonial produce to the United States. Upon the same reasons of policy are the relaxa-

Colonial trade. tions of the Navigation Law in the direct trade between the colonies and foreign Europe.

The general inference from these provisions, at once necessary, and *confined* to such necessity, is, that the government and legislature have only departed from the Navigation System within the degree of the urgency of new circumstances, and have always remembered the reason of the rule in the necessity of the exception.

Trade with Asia, Africa, and America, not being colonial.

The second division of our Navigation System respects the trade with Asia, Africa, and America, not being colonial.

In this trade, the principal object of the legislature was to encourage British shipping; and to abridge, if not altogether to extinguish, the Dutch carrying trade. The object of the third and fourth sections of the navigation act were twofold; *first*, to deprive the Dutch of being the carriers of Europe, and to prevent all importation from the opulent countries of the East, except in British ships; and next, to prohibit the rich commodities of these countries from being imported from any other place than those of their original growth and manufacture; or, at least, from such ports only where they could be, or usually had been, first shipped for transportation.

Under the principle of necessity, however, it became necessary, very early, to depart from the strict letter of these sections; and several successive acts were passed to except silk, bark, and drugs, &c. from these clauses. The multitude of these acts, and the cases which had risen under them, at length produced such a complexity in the law, and such inconvenience amongst ship owners and merchants, that the legislature found it necessary to consolidate the several provisions in one act. The 3 Geo. 4. c. 43. was principally passed with this purpose, and now constitutes the existing law of this division of our commerce.

Under this act, the rules for regulating this branch of our trade may be substantially stated as follow. 1. All goods and merchandize, the growth or manufacture of

Asia, Africa, or America, may be *imported* from any place into the United Kingdom in British built ships, and in British built ships only, except as hereinafter mentioned. 2. All goods, the growth, &c. of Spanish Royal America, may be imported in any Spanish built ship whatever, manned, &c. according to law. 3. All goods, the growth, &c. of Spanish Independent America, must be imported in vessels of the built and ownership of the place of growth, &c. that is to say, in Spanish Independent vessels. 4. All goods, the growth of any part of Spanish America, concerning which it is yet doubtful whether such part is to be considered as royal or independent, may be imported in any Spanish vessel whatever. 5. All Turkish goods must be imported either in Turkish ships, or in ships of the built of the usual port of shipment, or in British built vessels, &c. 6. Raw silk and mohair yarn of the growth of Asia, or of Turkey in Europe, may be imported into the United Kingdom from any port in the Levant seas, in any Turkish, Levant, or British ship; or from Malta or Gibraltár in any British ship. 7. And all goods, the growth, produce, &c. of the dominions of the Emperor of Morocco, which have been imported legally and directly into Gibraltár, may be imported thence into the United Kingdom; but in British vessels only, owned and navigated according to law. 8. Malta and its dependencies are to be regarded as a part of Europe.

Trade with
Asia, Africa,
and America,
not being
colonial.

It will be seen that the principal alteration in this head of our Navigation Laws is, by dispensing with the necessity of a *direct* importation of the produce of Asia, Africa and America. The merchandize of the three great continents may now be imported, in British ships, from any part of Europe; but except, under peculiar circumstances, such foreign merchandize can be imported from Europe, for *exportation* only. Goods and merchandize, of the growth, produce and manufacture of Asia, Africa, and America, when intended for home consumption, must be imported direct in British vessels, except in those cases which are provided for by 3 G. 4. c. 43:

European
trade.

The third division of our Navigation System respects the European trade, the rules of which were (until recently) contained in the eighth and ninth sections of the Navigation Act of Charles the Second; and were in substance, that the built and ownership of the ship should be of the same country with the goods. This statute, however, having been passed in a period of jealousy, and at a time when the true nature of commerce was not understood, it contained many prohibitory clauses, some of which have been occasionally repealed by acts passed for the purpose, whilst others were suffered to remain. The law had thus become inconveniently complicate, and foreign merchants most justly complained of some vexatious and invidious enactments. To remedy this mischief, and to consolidate all the useful and necessary enactments in a brief and perspicuous form, the two acts of 3 Geo. 4. c. 42., and the 3 Geo. 4. c. 43., were at length passed, and compose the existing laws of the European trade. The first of these laws is a general repealing act, and is limited to the repeal of all the former acts upon this subject; the second act contains, in a very brief compass, all the rules of the trade.

Following the order of this act, these rules may be very briefly stated. 1. All the following goods and merchandize of the growth or production of any place in Europe, that is to say, masts, timber, pitch, tar, tallow, hemp, flax, fruits, wine and brandy, olive oil and vinegar, may be imported into the United Kingdom in British built ships, or in foreign built ships, &c. of the place of growth or manufacture, owned, manned, and navigated according to law. 2. All goods, the growth of Turkey in Europe or Asia, may be imported into the United Kingdom in British or Turkey ships, &c. 3. The goods of Spanish Royal America may be imported in any Spanish ship, manned, &c. according to law. 4. The goods of Independent America must be imported into the United Kingdom in Spanish Independent American ships, and of the built and ownership of the place of growth. 5. The

act of 3 Geo. 4. c. 43. is not to be so interpreted as to interfere with the trade between England and the United States, nor between England and Portugal, as now established by law or long usage. Nor to alter or repeal the corn laws, nor such part of the Navigation Act as relates to bullion and prize goods. European trade.

Such are the existing rules of the Navigation System, as regards our European trade.

The fourth branch of our Navigation System respects our Coasting Trade, which it regards to belong as peculiarly to British subjects, as the internal navigation of the country itself. Upon this principle, the law confines it entirely to British ships, seamen, and capital; and, as modern times have admitted no relaxation of this original rule, it affords no observation for further remark. Coasting trade.

The fifth division of the Navigation Laws respects our fisheries, the existing rules of which may be summarily stated to be as follow:—The Fishery Acts being specially exempted from the statute of 3 Geo. 4. c. 43. 1. Every British vessel employed in the British fishery shall be British-built, British-owned, and shall be manned and navigated by a master and mariners *all* British subjects. 2. No fish whatever, of foreign fishing, excepting only eels, stock fish, anchovies, turbot, lobsters, sturgeon, and caviare, shall be imported into England (*a*). 3. All fish caught according to the first rule, *i. e.* by British subjects, British ships, and duly manned, &c. may be imported into Great Britain *duty free* (*b*). The Fisheries.

The value of our fisheries, both as a pre-eminent branch of commerce, and more particularly as tending to give a constant supply of seamen and maritime skill to our navy, is too obvious to require any further observation; except that, from the very commencement of our system of naval defence, our legislature has recognized their importance, and in every period has supported our exclusive possession of them by the most active encouragement.

(*a*) 18 Car. 2. c. 2. 33 Car. 2. c. 2. st. 2. c. 18.

10 & 11 Will. 3. c. 24. 1 Geo. 1. (*b*) 49 Geo. 3. c. 98. s. 13.

The Fisheries.

In earlier times the Dutch possessed an undoubted superiority in this branch of general commerce. The lower rate of wages ; the narrower sphere of the competition of manufacturing establishments with ship owners ; and the peculiar habits of the Dutch in working, and even building small craft, were some amongst the causes of this superiority. But by the prudent encouragement of the British legislature, these obstacles have been gradually overcome ; and we now as much excel all other nations in the produce and exportation of our fisheries, as in our manufactures themselves.

Of the System
of Bounties in
the Fisheries.

The chief improvement of modern times in this branch of our Navigation Laws has been in the gradual removal or modification of nearly all the bounties by which these fisheries were originally maintained. There exists no reasonable doubt, that the bounty system is no longer good than it is actually necessary ; and that it is no longer necessary, when the trial of fixing the roots of a branch of commerce has been sufficiently made, and has either answered its object, or has totally failed. In all ordinary circumstances the system of bounties is contrary to just commercial principles. A branch of trade or commerce may be cultivated with advantage or not. If it can be cultivated with any hopes of profit, the sagacity of dealers or growers will discover it, and will make the required essay without any inducement of bounties. If it be not cultivated, it is only abandoned because not worth the cost of labour and capital. Bounty, therefore, according to these principles, is either superfluous, as where it gives to those who would produce or manufacture the required article without it ; or, it is a mischievous tax upon the community for individual traders, inasmuch as it originates and maintains a wasteful and unprofitable branch of trade, and sinks a greater value than is ever repaid. On the other hand, there are certainly some cases in which the system of bounties may be useful to a country ; for there is a third or middle condition between a branch of trade being lucrative or not. It may not, for example, be immediately

lucrative; it may not make the profitable return in due time for mercantile views; it may be profitable for a State, which is a lasting being, though not for the life of an individual. It may be for the interest of the country, though not for the individual merchant or grower. This is the principle of the bounty system: but this principle has its limits. It would be absurd to give more for a branch of trade, or growth, or fishery, than, in the present state of all the interests of the country, it is worth. Where the object of the bounty is to clear away the first impediment; to make room, as it were, for the experiment of its possible profit, the bounty of course must end either with the full success, or with the total failure, of the experiment. A permanent bounty is a permanent tax; a submission to a permanent loss; and, however, under the earliest state of our marine, such an annual tax might be a sacrifice of one interest to advance another: it is certain that in the present condition of the navy and country such a fruitless expense is no longer required.

Of the System
of Bounties in
the Fisheries.

From the necessary effects of our fisheries upon our naval growth, it might be good policy, in the early state of our marine, to institute such fisheries at the expense of their full value, and to force their growth into our system: but now that our navy does not require the same extent of aid, there is no longer any good policy in such an attempt. The proper inference of what we have before urged is, that the bounty system was never adopted by our legislature upon mere commercial principles; and, therefore, does not fall within the objections of popular writers, as to the anti-commercial nature of such a system. It was adopted, like the whole of our Navigation Laws, with a direct view to our naval growth, and was admitted only under the principle of the subordinate nature of our trade in comparison with our naval defence. The legislature knew that it was originating and maintaining establishments, which in a commercial point of view might possibly be worth less than they would cost; but which, if

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they contributed little to our commerce, repaid amply as a nursery of seamen.—They knew they were trading, or growing, and encouraging trade, growth, or fishery, in a manner which no individual merchant would undertake, and which would not return a suitable profit to any private adventurer. But they knew at the same time, that an adventure might be profitable to a state which would be injurious to an individual; and that it might be good policy in a corporation, so durable as a nation, to found, build, and purchase, with a view to a more remote futurity than belonged in prudence to the aims of human life. In these principles the bounty system originated: And these circumstances having now passed away, and our navy no longer requiring this support at the expense of our revenue, the system has been relaxed as the reasons have ceased under which it grew.

The above brief view of the policy of this system, and its real objects, may be an answer to those, who, with more levity than either candour or knowledge, have imputed the grossest ignorance to the ablest men of any period; and, upon the ground of their own imagined clearer understanding of commercial principles, claim a triumph over the illustrious founders of our Navigation Laws.

Of the Regis-
try Act.

The last division of our Navigation System, for so it may be considered, is the Registration of British ships; a part of the system which gives effect to the whole, and brings the existing state of the British marine at all times under the view of the government and legislature. The object of registration is in fact three-fold:—1st, to ascertain the built and property of ships; 2dly, to prevent foreigners from being secret owners in them by always having a clear *exhibit* of the property in public documents; and, 3dly, to preclude any evasion of the law by our own merchants, and to give the due preference to British ship-builders and native mechanics.

For the purpose of maintaining and advancing our

naval interests the law requires that our own trade should be carried on in ships of our own built. In order to enforce this policy, and to render impossible any evasion of it, the law further requires that every British ship shall be registered at the time of sailing from her first port, and that without such registry she shall not have the privilege of a British vessel : and that upon every change of ownership, an indorsement of such change shall be made upon the certificate of registry. By the joint effect of these two regulations, every ship may be effectually traced back to its origin (c). And unless by a concurrence of fraudulent acts, which by the number of persons necessarily concerned must be nearly impossible, no ship of foreign built can be introduced into the British marine.

Of the Registry Acts.

Under the Navigation Act of Charles II. ships were required to be the property only of British merchants. It was only in the progress of the system that the qualification of being British *built* was likewise added. The ancient Navigation Act, thus encouraged British seamen and merchants. The existing Navigation System, as now seconded and enforced by the Registry Acts, has added to these two objects a third equally important object, the encouragement of British ship-building ; and has therein given the strongest security to our naval superiority.

Without these acts, the greater portion of our ships would be supplied from America, Holland, or any other country, where the low rate of wages, or the greater proximity of materials, might render ship-building cheapest. But by the force of these laws, a due proportion of the capital of the kingdom is directed towards the building of ships. The Registry Acts have certainly the same character of monopoly and commercial impediment with the other part of our Navigation system. But they have the same counterweight of producing a greater

(c) The reader is referred to the act for the forms of registration, and indorsements on the certificates, as they are too remote for our present purpose.

Of the Registry Acts.

good than they take away : they advance our navy in a greater proportion than they impair our commerce. Indeed, the largeness of the capital employed in our ship-yards renders it a matter of great doubt, whether the restrictions of the Registry Acts affect in any degree the price of ship-building ; and whether, from the extensive basis of this manufacture itself, ships are not built cheaper in English docks, than they could be fabricated by any poorer and less populous country.

In this point of view our Registry Acts, like the other portion of our Navigation System, will appear not only to have produced the immediate good intended for our naval interests, but to have corrected the mischief at first necessarily inherent in them, as a restriction upon the general freedom of commerce. So false are all general principles when applied without distinction through all particulars.

The rules of the Registry Law, as now required by the 4 Geo. 4. c. 41., are as follow. 1. Every ship is to be deemed a British ship (so far as to be imperatively required by law to be registered) which has been built in Great Britain or its colonies, or has been lawful prize. 2. Every such ship, above the burthen of fifteen tons, must be registered by the owner, and a certificate obtained of such registry in the port to which the ship belongs. 3. Without such registry, and such certificate, no ship can clear out as a British ship ; but if departing from port as a British ship, without being so registered, and obtaining such certificate, is forfeited. 4. Without such registry and certificate, all ships, although they belong to British subjects, are to be regarded to all intents and purposes as alien or foreign ships. 5. In certificate of registry, on all *future* occasions of registration, the owners must follow the form given in the 4 G. 4. c. 41 (*d*). 6. The persons authorized to make registry, and to grant such certificates, are the collectors and principal officers of the customs in any ports of the United Kingdom ; and in the

(*d*) See this form in Appendix.

colonies all such collectors, officers of customs, governors, or lieutenant-governors, as have heretofore been accustomed to make such registries. 7. In the case of British ships being repaired in a foreign country, the ship is to lose its privilege as a British ship, where such repairs shall exceed twenty shillings for every ton, unless in case of extreme necessity, and such necessity proved by the master on arrival in England, to the satisfaction of the Commissioners of Customs. 8. Ships declared unseaworthy, are to be deemed lost and broken up. 9. No captured British ship can be again entitled to registry: but ships condemned in the Court of Admiralty as prize of war, or as being for breach of slave laws, may be registered. 10. Ships are to be considered as belonging to the port at or near which one or more of the subscribing owners shall reside, and all ships are to be registered at the port to which they belong: but, in some particular cases, the Commissioners of the Customs may allow a ship to be registered in some other port, in which case the allowance must be by writing under their hands. 11. Whenever any subscribing owner or owners shall have made a transfer of all his or their shares, the vessel must either be registered *de novo* before she shall depart from port, or (if such register *de novo* cannot be made in time) the collector may indorse a permission on the certificate of registry, that the ship may perform one voyage. 12. Collectors and Comptrollers of Customs may indorse a similar licence for *one voyage* in the case of vessels built in our colonies for owners resident in the United Kingdom. 13. The owners, previous to registry, must take the form of oath given in 4 G. 4. c. 41.; and where there are more than one owner, the oath must be subscribed by the majority of those resident within twenty miles of the port of registry; or by one of such owners, if the others shall be resident at a greater distance. In such case, the attendant single owner is further to make oath, that the other part-owners are not resident within twenty miles. 14. At the time of such registry, a bond is to be given by the master and

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owners, and conditioned that the certificate shall be solely employed for the service of the ship; and that in case such ship shall be lost, burned, or broken up, or be forfeited for illicit trading, or be sold in execution for debt, or be registered *de novo*, such certificate shall be delivered up to be cancelled. 15. If the master be changed, the owner or new master must deliver to the officers of customs of the port (at which such change shall be made) the certificate of registry; and such officer shall indorse and subscribe a memorandum of such change, and shall further take of the new master a bond, that the certificate shall be used, &c. 16. The name of a registered vessel to be painted on the stern, and never to be afterwards changed. 17. Every person applying for a certificate of registry must produce a certificate from the builder of the vessel, which certificate shall state the time and place of building, the name of the first purchaser, and the tonnage; and such applicant shall make oath, that the vessel, for which such a certificate is required, is the same with the one described by the builder. 18. If the certificate of register be lost or mislaid, the commissioners may permit a registry *de novo*, or may grant a licence for the present use of the ship. 19. Any person detaining a certificate of register, however obtained, is to forfeit one hundred pounds. The owner in such case is to make oath before any justice of peace resident near the place of such detainer. 20. Ships altered in such a manner as not to correspond with the description of the former register, must be registered *de novo*. 21. Vessels condemned as prize, or for breach of laws against the slave trade, are to be registered on production of the certificate of condemnation, and to be registered only in the ports of Southampton, Weymouth, Exeter, Falmouth, Plymouth, Liverpool, and Whitehaven. 22. Upon every alteration in the property of a ship after registry, that is to say, upon any transfer of the whole or part, such transfer shall be made by bill of sale, or other instrument in writing, containing a recital of the certificate of registry, or of *the principal contents*.

of such certificate. But such bill of sale is not to be void by reason of any error in such recital. 23. Every ship, which (upon its first built, or an application made for its registry) is owned by two or more part owners, is to be considered to be divided into sixty-four parts or shares, and the registry must describe each owner as possessing a certain number of sixty-fourth parts; and no person is entitled to be registered as part owner, in respect of any part less than an integral sixty-fourth, and the oath upon first registry must state the number of shares held by each owner. But this rule does not extend to mercantile partnership firms. 24. No greater number than thirty-two persons can be registered as legal owners at one and the same time. But joint stock companies may appoint three trustees, in whose name the vessel may be registered. And corporate bodies may have such registry made, in the name and upon the oath of their secretary, or other proper officer. 25. Upon the registry *de novo* of every vessel owned in parts, (which registry *de novo* is required by the 3 Geo. 4. to be made before the 31st of Dec. 1825) the number of such parts held by each owner shall be registered. And, to this end, all the bills of sale shall be produced to the officers of customs; or, where they cannot be produced, oath shall be made by the parties that they are unable to produce them. 26. All vessels must take out a registry *de novo* under the act 4 Geo. 4. c. 41. within two years from the 31st day of Dec. 1823, unless detained upon any voyage beyond the day of the 31st of Dec. 1825, in which case the vessel must make such registry immediately upon her arrival at her own port, or some other port in the same member of the United Kingdom, or in the same colony. 27. No stamp duty is to be paid on any first registry, under this act, of any vessel before registered. 28. No future bill of sale can be effectual to pass the property in any ship, until such bill of sale be produced to the officers of customs, and until entry shall be made thereof in the book of registry ordered to be kept by such officers. Such registry to be made in the manner

Of the Registry Act.

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and effect of the form given in 4 Geo. 4. c. 41. 29. Such entry renders the bill of sale valid to pass the property as against all persons, and to all intents, except as against such subsequent purchasers and mortgagees, who shall first procure the indorsement of such entry, and of the particulars of the bill of sale, to be made upon the certificate of registry, in the manner hereunder mentioned.

30. When a bill of sale has been so entered in the book of registry, the collector shall receive no other bill of sale of the same ship, or same share of the ship, until thirty days have elapsed; or, in case the vessel shall be absent from the port, until thirty days shall have elapsed after the arrival of the vessel at the port to which she belongs; and in every case where there shall happen to be two or more transfers, by the same owner, of the same property in any ship, the collector, in making the indorsement on the certificate of registry, shall give the preference to that bill of sale, under which the person claims property, who shall produce the certificate of registry for that purpose within thirty days next after the entry of his bill of sale in the book of registry, or within thirty days next after the arrival of the ship in her port; and in case the certificate of registry be not produced within the said space of the thirty days, the collector must make the indorsement on such certificate when produced, and to the person producing it. "It being the true intent of this Act (4 Geo. 4. c. 41.) that the several purchasers and mortgagees of any ship or shares of a ship (when more than one appear to claim the said property) shall have priority one over the other, not according to the respective times when the particulars of the bill of sale were entered in the book of registry: but according to the time when the indorsement is made upon the certificate of registry." If the certificate of registry be mislaid, lost, or detained, the commissioner of customs may grant further time, or (upon proper cause shewn) may grant a registry *de novo*. 31. For the convenience of ships, after a bill of sale has been duly entered in the book of registry at one port, it may be produced at

any other port where the vessel may then be; and the indorsement on the certificate of registry may be there made, previous notice being given to the officers at the port of registry. 32. If it shall become necessary to register any vessel *de novo*, and any share shall have been sold, and omitted to be recorded and indorsed, since her last register, the omission shall then be supplied. 33. Upon every change of property in a ship, whether such change of property shall require a new registry or not, such registry *de novo* shall be granted by the officers of customs, if desired by the owner or owners. 34. Copies of oaths and extracts from books of registry are to be admitted as legal evidence, without the personal attendance of officers of customs. 35. Where ships, or shares of ships, are sold, in the absence of owners by their agents without formal powers, the commissioners of customs, on proof of fair dealing, may permit such transfer to be registered and indorsed, or (according to the circumstances of the case) a registry *de novo* to be made; due security being given to produce the legal powers, or to abide future claims. 36. All transfers by the way of mortgage, or as security for a debt, shall be so stated and recorded in the book of registry, and in the indorsement on the certificate; and where such indorsement or registry *de novo* shall have been made in the favour of mortgagee, assignee, or trustee, the rights of such parties shall not be affected by any act of bankruptcy of mortgagor or assignor, committed after the time of such registry or indorsement.

Of the Registry Acts.

Such are the principal rules upon which the Registry Acts are founded; the more subordinate rules, qualifications, and exceptions, will be found in the body of this Treatise. The statute of 7 and 8 Will., which was the origin of the modern Registry Acts, was only intended to prevent fraud and abuses in the plantation trade. It was the policy of Lord Liverpool's Registry Acts (26 and 34 Geo. 3.) to enlarge and improve the provisions of that statute; and to extend and apply them to all merchant ships whatsoever, exceeding a certain tonnage. The

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4 Geo. 4. c. 41. has now consolidated all the enactments in one statute. It has removed much of the difficulty and complexity which existed in the former acts, embarrassing the transactions of merchants, and rendering in many instances the transfer of property in ships uncertain and unsafe. By accommodating itself to the new forms of commerce, and the enlarged compass of mercantile dealings, this statute has conferred a most solid benefit upon the shipping interest, and is to be regarded as a valuable contribution by the Board of Trade to the merchants of Great Britain. 1st. By not invalidating the title of an owner, who fails to record his purchase at the Custom House within a limited time: but only rendering the recording necessary to the completion of his title, it protects him against an inconvenience and injustice frequently experienced under the late acts. 2. By permitting a direct mortgage of an interest in a ship (upon the legality of which so many doubts had been entertained by the highest authorities) it places shipping upon its just equality with the other property of the country; and by giving security to the mortgagee, without subjecting him to the obligations and liability of an owner, it gives facility and encouragement to those advances upon ships, which the exigency of trade so frequently requires. 3. By exhibiting the proportions of interest held by each owner, it equally facilitates both sales and mortgages, and gives a new value to shipping in the monied, as well as in the mercantile classes. 4. By permitting the shares in the ships of co-partnerships to be registered as joint property, and to be subject to the same rules as other partnership effects, it establishes a salutary principle with respect to ship-owners, the want of which, under the construction of the old acts, occasioned frequent injustice and much difficulty, both in the courts of law and equity. 5. By providing that the indorsement of a transfer should be made and signed by the officers of the Customs on the production of the bill of sale; thereby completing the title, and dispensing with the production of the bill of sale on any

subsequent registry, it repeals a number of minute and perplexing regulations, which have been found in practice rather to occasion fraud than to prevent it. 6. By the provisions which it contains against the fraudulent disposal of ships abroad, under the false or exaggerated pretence of unseaworthiness, it guards, as effectually as law can do, against the abuse of authority in masters, and the frequent practice of colluding with them to the injury of the owner. 7. By the many excellent provisions which it contains in the cases of registers mislaid or lost; of registers hastily detained from the use of the ship; and by the discretion which it allows in difficulties which arise from the absence of owners, or of ships from their ports of registry, it confers a valuable benefit upon the merchant, on occasions which had been overlooked, or unprovided for, by the late acts. 8. By increasing the extent of repairs which a vessel may undergo in a foreign port, without forfeiting her British privileges, from fifteen shillings to twenty shillings per ton, it establishes a most useful regulation, which is rendered consistent with the policy of the law by the checks introduced to guard against abuse; and the course of proceeding in case of repairing beyond that amount, is equally consonant with the spirit of the Registry Acts. Nor, amongst the more minute and subordinate regulations of this act, ought we to omit that the division of the property in ships, into sixty-four assumed shares, upon the binary principle of halving the ship, and the proportions under each, down to a sixty-fourth part, will be found in practice to be a most convenient system; together with the permission which is given to register a ship in the names of three trustees of joint stock companies, instead of requiring the names of all the members.

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In the body of the work the reader will find the several rules, and their reasons, treated with the exactness, and in the detail, which their legal character and importance require. Enough is above said here to explain in a preliminary manner their wisdom and efficacy, as respects the

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accomplishment of their object ; that of precluding any evasion of the Navigation Laws, of preventing foreigners from having an interest in British vessels, and *tabulating*, as it were, the maritime strength and resources of the kingdom, in aid of those who may be charged with administering the duties and powers of government. Any augmentation or decrease of British shipping is now as immediately known by the government, as any rise or diminution of the revenue. But the first step towards the remedy of any evil is the exact knowledge of its nature, degree, and cause.

In the examination of the Register Acts, as a whole, it will likewise be found, that they connect and combine the public interest of the state with the private advantages of the merchant ; and therein indemnify the latter for the numerous forms they prescribe. They secure to the British mechanic and artisan the building and equipping of all vessels employed in every branch of our trade. They extend, moreover, their beneficial effects into the various departments of commerce, and into those dealings and contracts which grow out of and depend upon property in shipping. The publicity of the Register Acts, and the circumstance of their having the character of national muniments, gives confidence to all contracts relating to any interest in this property. They prevent frauds upon underwriters ; and by making any alleged property in shipping an interest always to be ascertained, they now give a security to all transactions respecting ships, both as to sales and mortgages, which cannot be acquired in any other branch of business. They enable, moreover, a purchaser, the assignees of bankrupts, and other representatives of an owner, to trace a ship from port to port in all the various transfers through which she may pass ; and as every change of property in a ship, whether in or out of her port, must be publicly recorded, they bring under the eye of the legislature every transaction respecting shipping, and every circumstance affecting its increase or diminution. And thus, as is well ob-

served by an able writer on this subject, to whom the author of this Treatise is so much indebted (e), a very considerable utility arises from the documents which are formed in the execution of the Registry Acts. The registry of shipping, which is made up to the 31st of September in every year, contains facts of importance which become premises for conclusions both political and commercial. In this registry is seen how many ships and vessels belong to every port in the kingdom, their tonnage and their size, and the number of seamen which they employ. It is now accurately known where to look for the most abundant supply of seamen, when the public service demands them. It is further known at what port to enquire for ships; whether they are wanted by the government for transports, or the merchant for freight.

Next to the Registry Acts we have considered those beneficial statutes, by which the rigour of the law, respecting the seizure and forfeiture of ships for any breach of the acts, (relating to the shipping, trade, and commerce of the country), is so considerably relaxed, as to adapt itself to the possible occasions of some strong equity and expediency which circumstances may throw up. This has been done by two recent acts, in a manner so as to maintain the policy of the general rule, and still to open it to such exceptions as commercial equity may require (f). It will not, perhaps, be too much to assert, that a great portion of the system of those equitable statutes arose from the celebrated judgment of Sir William Scott, in the case of the *Betty, Cathcart* (g).

In concluding our remarks upon this part of our Navigation Laws, and this Introduction to the first part of our Treatise, it would be a want of patriotic feeling, and of

(e) Mr. Reeves, p. 488. And these acts, moreover, have very much abridged smuggling, which prevailed to an alarming extent before the Registry Acts.

(f) See 27 Geo. III. c. 32.; 51 Geo. III. c. 96.; 54 Geo. III. c. 171. These

acts give a power to the Commissioners of Customs and the Lords of the Treasury to remit penalties and forfeitures, under the Navigation and Shipping acts, &c. upon certain terms and conditions.

(g) 1 Rob. 220.

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the justice due to a great name, not to acknowledge that the country owes the original system of the Registry Acts to the late Earl of Liverpool ; one of those men whose name will always descend with the greatness, opulence, and commercial superiority of the country ; as having employed a long and laborious life in an indefatigable pursuit of the public good, and as having at length so successfully accomplished what, through all impediments, he so invincibly followed. It was the talent and industry of this nobleman, which first reduced into light and order what before was but a mass of incongruous and contending elements. By bringing to this object of his study the practice of business, and the knowledge of life and character, Lord Liverpool foresaw, and thereby prevented, all those evasions which had hitherto rendered the system of Registry nugatory in practice ; and by having a deep and exact knowledge of the true principles of trade and commerce, he was enabled exactly to limit a general principle, or to restrain a necessary exception, at those precise points of each, where either the principle was less true in practice than in theory, or where the exception cost a greater sacrifice than the end for which it was introduced was worth. The result of such talents, knowledge, and industry, thus employed, is the system of registration such as the public now possess it ; and, therein, such a buttress to our Navigation Laws, as will render this magnificent portal of our National defence as lasting as the citadel itself, of which it is an out-work. Without our commerce, and our commerce under the Navigation System, our existing naval dominion and superiority would be but a tree without a root : but whilst thus planted in the inexhaustible resources of our national wealth, and fed through all its height and breadth by a never-ceasing spring, that Navy and Commerce, by which we have become what we are, will continue for centuries to be the trunk and the shade under which our children's children shall maintain their descending inheritance.

II. OF MERCHANT SHIPPING AND SEAMEN.

IN considering the Law of Shipping as a whole, but divisible into its subordinate parts, the mind immediately perceives that the subject matter distributes itself into three principal members:—The first, the Navigation Laws, under which every vessel must be built and navigated; and which, therefore, is the foundation and commencement of the whole System.—The second is the ship itself and crew, and whatever belongs to the ship, abstracted from its employment by the merchant.—And the third and last part treats of such employment of the ship by a merchant charterer or freighter, and generally of all contracts under which merchant shipping is hired or let out. Such, therefore, is the order of our subject, and the division of our subject matter. In the former part of our Introduction we have endeavoured to give a general view of the Navigation Laws, and of the principles upon which they rest. In this part it is proposed to execute the same purpose as regards the Law of the Ship itself, the owner, master, and crew, abstracted from its employment under a contract with the merchant, and further separated from the detail and discussion, which belong to them in the body of the Work.

Part Second.
Of Merchant
Shipping and
Seamen.

Under this relation, the first point of consideration is obviously the property of the ship, the manner of acquiring or alienating it; and, as such property may be possessed by several in common, the rights and liabilities of owners and part-owners: the second, that of the legal authority, duties, and liabilities of the master; and the third, that of the duties of the seamen, and the legal mode of their hire and payment.

FIRST, therefore, as respects the property of ships in whole or part.

Of acquiring
property in
ships.

1. As respects property in ships, it is of course acquired ordinarily either by being the builder, or by purchase from another. In purchase from another, there is this main difference between a ship and another personal chattel, that from consideration of its great value, and from a kind of public as well as private character, the law requires all transfers of ships to be by bill of sale or other instrument in *writing*. (h) The ship at the time of sale is in port, or absent at sea. If in port, the sale must be by bill of sale; and in order to render such bill of sale effectual, it should be immediately carried to the officer of the port to which the vessel belongs, and should by him be entered and described in the book of registry; and after such entry, the officer must indorse a memorandum of the transfer upon the certificate of registry. In case the vessel be absent, and the certificate of registry be with the master, thirty days are allowed after the arrival of the vessel for such certificate of registry to be produced. If it be then produced, the indorsement is made, and the property of the ship or share finally conveyed. In the mean time, namely, before the lapse of such thirty days, the entry on the book of registry, *per se*, passes the property of the ship or share from the date of the entry on the book of registry. If the certificate of registry of a ship, which is in port at the time of transfer, be not produced and indorsed within thirty days after entry of the bill of sale on the book of registry, or within thirty days of the ship's arrival, if the ship be absent at the time of sale and entry on the book of registers, then the officer of customs may make indorsement to any subsequent purchasers or mortgagees, who shall first produce the certificate of registry. 4 Geo. 4. c. 41. § 35, 36, 37.

Of the mort-
gagee of a
ship.

2. A frequent relation amongst ship-owners is that of being mortgagee of the vessel of another. Such a mortgagee is, as to certain circumstances, not an owner; and is, therefore, not liable for necessities or services for the

(h) 4 Geo. IV. c. 41. § 29.

ship. He is in fact, for most purposes, only in the same situation with the mortgagee of real property. We have already shewn, that the numerous embarrassments and uncertainties which accompanied this relation have been effectually removed by the new Registry Act, 4 Geo. 4. c. 41. § 43. The transfer of a ship by way of mortgage is now expressly recognized by the legislature. The mortgagee is no longer to be viewed in an equivocal character; but, in the express terms of the act, is not to be deemed an owner. And in order to complete the security of the relation of mortgagee, and to exclude many of those inconveniences which arose under the bankrupt laws, the new act provides, that the transfer of ships for the security of debts when registered, according to the provisions of the act, shall convey such a title to the mortgagee, that his right shall not be affected by any act of bankruptcy of the mortgagor, after the time when his mortgage shall have been registered, notwithstanding the mortgagor, at the time of his becoming bankrupt, should have in his possession, order, and disposition, and be the reputed owner of the ship, so mortgaged or assigned; in other words, that the mortgage or assignment shall take place of and be preferred to any right or claim of the assignees of the mortgagor, under the 21 Jac. c. 19. But if the mortgagee be in possession of the ship, that is, if he be the registered owner, and in possession, he is of course owner *de jure et de facto*; and, therefore, liable accordingly. But a registry by itself is no proof of ownership in a civil suit; for it is capable of being made without the act of the party himself; and in almost all cases there is a possibility of its being so made; so that an insolvent owner might add to his own name in the registry that of a solvent man, and thus render a person liable without his own act.

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3. Another frequent relation amongst owners is that they charter their vessel to a merchant to be employed by him as a general ship: in which case two persons are ostensibly held forth to the public as owners; the actual

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owner; and the merchant freighter exercising all the acts of ownership. In this case the distinction must be taken, whether according to the terms of the charter-party, and the manner of navigation and service, the ship itself be let out, or only the *room and space* of the ship. If the ship itself be let, and the captain and crew be effectually the servants of the merchant-freighter, which is sometimes the case, the merchant will be liable for all necessities, accidents, &c. But if the *space or room* only be let out, and the owner remain in full controul and dominion of the ship, the owner will himself be liable for all necessities, accidents, &c.; except only as respects the persons with whom the merchant himself has contracted, that is, the under or subordinate freighters.

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ers.

4. But a fourth, and the most frequent of all relations of ship-owners, is that of being part-owners with each other: that is, possessing a ship in shares. The two most common questions under this circumstance are,—first, how far one part-owner is liable for the acts of another; and, secondly, in the event of disagreement with each other as to the employment of the vessel, how the decision is to be made; each person possessing his own part in exclusive dominion, and neither having any representative character as regards the other. With respect to the first of these questions, and in all cases which arise under it, the principle lies in the difference between partners and part-owners. Partners are two or more persons, who have so united, and as it were incorporated, with each other in prosecution of some *general* concern, that the act of one is the act of both; and so far as relates to the general concern, each represents himself and the other. But part-owners have no other union nor association than the common possession of the same personal chattel. In partnerships, properly so called, one man cannot become the partner of another *without* his consent: but part-owners may be imposed upon each other, without consent; namely, by purchase, succession, &c. They have, therefore, no general representative; nor can one part-

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owner act generally for the other. But as it is a necessary presumption of law, that the common possessors of a valuable chattel must *will* and desire whatever is necessary to its preservation ; and, in their absence, must equally *will* and desire the profitable employment of their common property ; so the law further infers, as a necessary consequence from the first presumption, that a part-owner on the spot has an implied authority from the other absent part-owners to order for the common concern whatever is *necessary* for the preservation, navigation, and proper employment, of the ship. This is the principle, and the limit of the liability of part-owners. Part-owners, therefore, are liable for *necessary repairs* ordered by one of themselves. They are equally liable for *necessary stores* taken up by the master or one of themselves, during the voyage. But they are not liable for an insurance ordered by one of them ; neither for enlarging a ship, nor for painting it. But, as respects the necessary repairs and expenses of the ship, part-owners are bound to the third persons who make those repairs not only for their own share, but for the whole ; and therefore, if any one fail of paying his share, the others must pay it rateably for him. The reason is, that they are partners as respects the *necessaries* and proper employment of the ship. Upon the same principle of their being partners, so far as respects the contracts and concerns of the ship, they must sue and be sued jointly ; for example, they must sue their freighters jointly ; and, on the other hand, may claim to be sued jointly by their shipwright, &c. With respect to this relation, the new Registry Act has much altered its character and extent. In the first place, by providing that no more than thirty-two persons shall be owners at any one time, as tenants in common in any British ship ; and, secondly, that where shares are held by partnership or joint stock companies, the ship may be registered in the names of the copartnership or joint stock companies, without distinguishing the proportionate interest of each owner ; and that such shares shall be deemed partnership

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property, and governed by the same rules of law and equity as other partnership effects.

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5. As respects the settlement of any differences which may arise amongst themselves, such differences usually arise, either as regards the employment of the ship, or as regards the settlement of the accounts. As respects the employment of the ship, if the majority of part-owners agree to employ the ship in a certain manner, but cannot procure the consent of the other part-owners, the Court of Admiralty (upon the arrest of the ship by the dissentient minority) will then take a stipulation from such majority in a sum equal to the value of the shares of those who disapprove of the venture, that the stipulators will bring back the ship, or pay the latter the value of their respective shares. The ship then sails at the charge, risk, and profit of the stipulators.

6. If the disagreement respect the adjustment of accounts, and there be no written agreement by which the part-owner concerned has consented to account as if in *severalty*, the only remedy as between part-owners is by a suit in a Court of Equity. But if there be a written agreement to account as if in *severalty*, the Common Law will attach upon it; and an action may be maintained against the part-owner so agreeing. This is, therefore, the more prudent mode.

7. As each part-owner has a dominion in his part, and as his part and those of others are inseparably connected as respects the use; so each part-owner has a dominion in the ship, whilst in possession. One part-owner, therefore, cannot recover damages against another for employing the ship *without or against* his consent, even though the ship should be lost. In the same manner, there is no redress for one part-owner, neither in the Courts of Law nor Equity, if the ship be sent or taken to sea without his consent. The remedy is to arrest the ship, previously to departure; in which case the Court of Admiralty will order the stipulation above-mentioned. But if one part-owner have possession of the ship, he has the dominion of

the ship, and may use it as a tenant in common ; that is, subject to account for profits, and responsible for its injury or destruction : but within such limits he is perfectly free to use it.

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The above are the principal questions, and the source of the principal cases, which arise under ownership and part-ownership. The detail and more accurate distinctions belong to the following treatise. The above synopsis, however, may not be without its use in aid of memory and reference.

SECONDLY,—As regards the duties, liabilities, and authority of the master ; or, in other words, his legal qualifications ; his authority to employ the ship ; and his power to bind his owners for repairs, stores, and necessaries.

8. The qualifications of the master and seamen, as British subjects, under the Navigation Law, have been already mentioned. By these acts, chiefly consolidated in the 34th of the late king, (i) the following are the rules and qualifications as respect the master and seamen :—1. In the *general* trade by British ships, the master and *three-fourths* of the mariners at least must be British subjects, with the exceptions hereafter mentioned. 2. In the *coasting* trade, the master and *all* the seamen must be British subjects. (k) 3. And this legal proportion of British seamen is to be kept up during the whole voyage, unless in case of sickness, death, desertion, or capture of any or the whole. 4. The master of a British ship shall in all cases be a natural-born subject ; or a naturalized subject ; or a denizen by letters of denization ; or one who has become a subject by virtue of conquest or cession, and has taken the oath of allegiance as such. 5. But foreign seamen, who shall have served in time of war three years on board

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(i) 34 Geo. III. c. 68.

(k) But four or more of the commissioners of customs in England, and three or more in Scotland, may license the employment of foreign mariners (not exceeding *one-fourth*), in any ves-

sel. fishing on the coast, for the purpose of instructing British mariners in the art of fishing, or curing fish. And, as respects the fisheries generally, the prior Navigation Acts are saved from this Act.

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a king's ship, and shall have obtained a certificate of faithful service and good behaviour from the commander, shall be deemed British seamen on taking the oath of allegiance. 6. But the qualification in all cases, and by all persons, is forfeited by taking an oath of allegiance to a foreign power, except under the terms of a capitulation, and for such capitulation only. 7. No ship, however, is to become forfeited for the employment of an unqualified person, where such disqualification was unknown to the owners and master. 8. But in the seas of America or the West Indies negroes may be employed. 9. And, in the seas to the eastward of the Cape of Good Hope, Lascars, and other natives of the countries to the eastward of the Cape. 10. The ship and cargo are liable to forfeiture for any breach of these rules, in the same manner as if contraband. 11. But if a British vessel be in a foreign port, and have been compelled by necessity to engage a greater number of foreign seamen than allowed by law, such vessel shall not be liable to forfeiture, upon production of a certificate of such necessity from the British consul resident in such port; or, if there be no such consul, of two known British merchants there resident. 12. And, in the case of war, the king may publish a proclamation, by which he may allow British vessels to be manned with foreign seamen in the proportion of three-fourths of the whole crew. Such are the qualifications required by law in masters and seamen.

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9. As to the authority of the master to employ the ship, the general rule is, that the owners are bound by every lawful contract made by the master relative to the *usual* employment of the ship. The reason is, that the master is the agent and servant of the owners for the conduct, government, and controul of the ship in its usual way; and, therefore, all engagements by him for such usual employment are the acts and contracts of a servant within the subject matter of his commission. Therefore, if a master receive goods on board in the usual employment of the ship without the knowledge of the owner, the owner

will be liable for their loss to the freighter. But if the master take goods not in the *usual* employment of the vessel, the owner will not be liable. The distinction is, that in the one case he is a servant acting within his trust and commission; in the other, he is acting beyond it.

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10. Upon the same principle, if the master (being in a foreign port) enter into a charter-party in his own name for the employment of the ship, the owners are bound by it; and the merchant may have an action on the case at common law for its faithful performance. And if the master make any particular engagement or warranty, such as that he will load or deliver within a certain time, the owners will be bound by such special contract, although made without their knowledge. In a word, the master is the confidential servant of the owners in all that concerns the usual and ordinary employment of the vessel, and his contract within this service is that of an acknowledged agent for a principal, and servant for a master. And what is the *usual and ordinary* employment of the ship is to be determined either by the course of its *actual* employment, or by that of vessels in the same trade or service.

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11. But as the immediate act of the owner himself necessarily supersedes the authority of the servant; so if the owners have themselves made a special engagement for the employment of the ship, the master cannot of course annul it. In the absence of his owners, the master is their servant to act for them. In their presence, his duty is to obey.

12. It is another rule, that for the sake of the convenience of trade the master is himself liable upon his own contracts, and must indemnify himself from his owners. Those who contract with him for the ship have a two-fold remedy; one upon the master, and the other upon his owners: and sailors have a third security upon the ship itself, by a suit for wages in the court of Admiralty. Such, therefore, are the general principles of the authority of the master as respects the employment of the ship.

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13. The authority of the master to bind his owner for repairs and necessities is a consequence from the same principle; such an authority being necessary for the preservation of the ship, and being legally presumed to be given, because absurd to be withholden. The master, therefore, is authorized to provide all *necessaries* for the ship. And such necessities may be either repairs, stores, or money. For such *necessaries* the owner is liable. But the creditors *generally* must prove that such repairs or money were necessary; for if the owner should negative the existence of the necessity, his liability, except under peculiar circumstances, would cease.

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14. The custom of merchants, and therein the law which adopts the custom, has introduced two modes of making such repairs, or taking up such money, by masters; the one, upon the personal credit of the owners; and the other, upon the hypothecation of the ship. If the repairs or money be made or taken on the personal credit of the owner, the owner, as above said, is liable; subject only to proof, under any suspicious circumstances, that the repairs were reasonably fit and proper, and that the money or stores were wanting.

15. But as the hypothecation of the ship is manifestly a better security than the mere personal credit of the master and owners, money and repairs in a foreign port are more usually secured by an instrument of this kind. It is unnecessary to add that the master has the authority to give hypothecation bonds, or bonds in the nature of bottomry, according to the necessity of the case; and that the ship is thus bound in *specie* to the repayment of the money lent. The master has this power, because it is necessary to the preservation of the ship, which, in foreign ports, where neither master nor owners were known, could not procure the necessary repairs upon personal credit. And the law of England has thus recognized and adopted it upon the double principle; first, of the custom by the law merchant; and, secondly, from its manifest necessity.

16. But as this power of the master amounts almost to a complete dominion and disposal of the property of another, the custom of all countries, and the law of our own amongst them, limits this hypothecation by the master to the circumstance of the vessel being in a *foreign country*, or in the course of her voyage, and not in the place of her owner's residence. But the courts have given a liberal interpretation to the term place of residence; and in two cases, as will be seen in the body of the Work, Ireland and Jersey have been deemed foreign ports, sufficiently to justify the master in taking up money upon bottomry.

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17. If a ship, therefore, be in a state of necessity, and in the course of her voyage, whether she be in a foreign port, or in a port of one British island (the owners living in another) or even in a remote part of the same kingdom, the master may hypothecate ship, freight, and cargo, for her repairs and necessaries. But three circumstances must always exist in the condition of the ship at the time of hypothecation:—1. The state of necessity of the ship for repairs, stores, or money. 2. Such a remoteness from the owners as not to admit of awaiting their own advice or aid. And, 3dly, the impossibility, or extreme difficulty, of obtaining supplies on the personal credit of the master or owners.

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18. Without such bonds of bottomry and hypothecation, the creditors of a ship can have no remedy on the ship, in specie, as the subject of a specific lien for repairs made, or necessaries supplied. Thus the master has no lien for his wages, nor even for money advanced by him for the necessaries of the ship. The reason may be briefly said to be, first, because a lien always presumes the possession of the subject matter of lien by the creditor; and, secondly, from the manifest mischief to commerce, and to individuals, in the delay which would be occasioned by applying such a practice to ships. But if a shipwright, who makes the repairs of the ship, have such vessel in his manual possession, that is, in his dock, and without the

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master and crew on board, he will of course have a lien for his repairs, unless there be a special custom of the port or place to the contrary; or unless the work be done upon an agreed credit. For with respect to lien, the general rule is, that it obtains only where a ready-money payment is due upon the completion of the work; and that where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession of a chattel, inconsistent with the terms of the contract.

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19. As the master cannot hypothecate the ship but in a case of necessity; so there must be a still stronger necessity, which can authorise him to sell it. Indeed this necessity must be so supreme, as very rarely, and scarcely in practice, to occur. As the master is employed only to conduct and navigate the ship, the sale and disposal of it are manifestly beyond his commission; and are, therefore, the unauthorized acts of a servant disposing of that property of his master which he is entrusted only to carry and convey. This is, therefore, the principle not only in all customary cases, but in cases of common danger and ordinary necessity. In all such circumstances, therefore, the duty of the master (if the ship be stranded, and cannot be got off, or be so injured by tempests as to be beyond repair or safe return,) is to await, if possible, a communication with his owners. But if this be impossible in time for the preservation of the ship in bulk, the law will always presume an authority in agents and servants necessary to the conservation of the article, or to the preservation of as much of its value as the occasion may admit. The New Registry Act 4 Geo. 4. c. 41. § 7. has reference to this condition of a vessel. It enacts that if any ship or vessel, registered under the authority of this or any other act, shall be deemed or declared to be stranded or unseaworthy, and incapable of being recovered or repaired to the advantage of the owners, such ship may be sold by order or decree of any competent court for the benefit of the owners, or other persons interested therein, where-

upon the same shall be taken and deemed to be a ship or vessel lost or broken up, to all intents and purposes within the meaning of this act, and shall never again be entitled to the privileges of a British built ship for any purposes of trade or navigation. The master, as we have before observed, is *de jure* the agent of the owner of the vessel: but he has no such extensive relation to the freighter, unless he be specially constituted his agent: Unless, therefore, in the case of an extreme necessity, no act of the master can affect the owner of the cargo. He may, under certain circumstances, hypothecate the cargo; or even sell a part to repair the ship: but as he can only act for the presumed benefit of the freighter, and as it can scarcely ever be for the benefit of the freighter that the entire cargo should be sold, and the adventure broken up, the power of sale cannot, except under an extreme state of things, extend to the *whole* cargo.

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THIRDLY, As to the seamen and their wages.

20. The first rule is, that the contract of the seamen for service must be made with the ship-owner, or master, by a written agreement signed by him and the mariners; such agreement to express their wages, and the voyage for which they are hired. The contract thus signed becomes the articles by which the seamen are bound to the master. If a seaman, after having signed the articles, refuse to proceed, or desert, he may be summarily arrested and punished by a justice of the peace. Absence from the ship, without permission of the proper officer, is punishable by forfeiture of two days' wages for every day of such absence. Leaving the ship without a written discharge from the proper officer is punishable by forfeiture of a month's wages, and disobedience to any lawful command of the master by forfeiture of the whole wages.

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21. These articles of agreement have been deemed to justify the reasonable correction of the seamen by the master; namely, such correction and authority as a master may exercise over his apprentices; such as may be necessary for the purpose of the government of the ship, and

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for the suppressing immorality and vice of all kinds. But, on the other hand, the law having a due regard to the liberty of the subject, and to the different degree of the public interest concerned in the merchant and king's services, regards this exertion of authority with the greatest jealousy; and most strictly confines it within those limits which are necessary for the safety of the ship and the due progress of the voyage. Accordingly in all cases a seaman, who has been beaten and imprisoned by the master, may, upon his return to a British port, bring an action against him; to which the master must plead *specially upon the record* that the seaman had committed some particular fault, (specifying such fault) and that he had corrected him only moderately for it.

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of the seamen.

22. As respects the wages of seamen, the principal points of consideration are, how and when they are earned; and by what means they are recoverable in law. As regards the earning of wages by the seamen, the general rule is, that if the voyage be completed, the freight earned, and the labour of the seamen be not rendered useless by the loss of the vessel by sea or capture, the sailors have earned their full wages. If the vessel be lost or taken, the seamen lose their wages; but not by sickness or accident during the voyage. And as the seamen are bound to the master, so is the master to the seamen; and he cannot discharge any of them during the voyage, unless for misconduct amounting to mutiny or general disobedience of orders. And that the contract of merchant seamen may not interfere with the public service, it is expressly provided, that an impressed sailor shall be entitled to his wages up to the time of his impressment, if the ship earn freight; and that entering into the king's service shall not be deemed a breach of articles.

23. As the wages of a seaman are not due till the completion of the voyage, and a voyage frequently consists of several parts, there is sometimes a difficulty to determine, whether a seaman be entitled to his wages for any part, where the whole has not been safely concluded. The

principle is this; the general rule of law being that freight is the mother of wages, the seamen are to be deemed to have earned their wages in all cases in which the vessel has earned its freight. If a voyage, therefore, consist of parts, such as an outward and homeward voyage, or several parts successively, the freight for each part being due when it is finished, the wages for that part would likewise be due, unless (as is usually the case) the contract stipulates for all the parts as for one voyage.

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24. In the case of capture and recapture, if the seaman continue on board, and complete the voyage, so that freight be earned, he is entitled to his wages during the whole time. And as a precautionary embargo is not a capture, seamen violently detained by an embargo, and separated from the ship, but afterwards restored, and navigating the ship home, are entitled to their wages during the whole of their detention; the ship having earned her freight.

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of the seamen.

25. As the master by the articles has hired *all* the service of a seaman, the seaman cannot claim any extra remuneration, even though the master may have promised it, such seaman having nothing to give to which the master was not before entitled. Therefore, where a master in a storm promised an extra reward to his crew for doing their duty, the court decided that such promise could not be enforced, so far as respected the earning of wages.

26. As respects the payment of seamen's wages, the rule is, that the seamen, with the exception of the master only, have a three-fold remedy for their wages,—against the ship, against the owners, or against the master. The master's contract is personal with the owners; and he must, therefore, bring his action in the Court of Common Law. He cannot sue in the Admiralty Courts with the seamen, nor has he any lien on the ship for his wages or disbursements; he trusts his owners, and must look to them personally. But the seamen, either singly or altogether, may sue in the Court of Admiralty; and may arrest

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the ship by the process of that court, as a security for their demand, or may cite the master or owners personally to answer them. But if the seamen be hired by *deed*, and with special conditions ; that is, not in substance the same with the articles in common use ; in such case, as the fact of such deed, if denied, cannot be tried in the Court of Admiralty, the action must be in the Courts of Common Law. But if the deed have no special conditions, the circumstance of its being a deed, that is, having a seal, will not take away the jurisdiction of the Admiralty ; and the wages may be recovered, as above said, by the arrest of the ship.

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27. The Court of Admiralty will give its aid in the same manner, namely, by the arrest of the ship, to foreign seamen in a British port ; unless where the contract is of a nature specially referring to their own law ; and such law is not so set forth in the contract as to enable the court to judge upon the face of it.

28. The wages of seamen take precedence of all other demands, and are the most sacred of all liens. But actions for such wages must be commenced within six years after the cause of such action shall accrue, unless those impediments exist which in other cases take a demand out of the statute of limitations ;—such as, minority, lunacy, captivity, or absence beyond seas. If the agreement be by deed, the demand may of course be made within twenty years. The form of action is by *assumpsit*, or action of debt, or (in the case of a deed) by debt or covenant. The master, though a servant of the owners, has a distinct interest from them ; and therefore may be a witness either for the owners or sailors. And if the articles are wanting, the seamen may apply to a Judge for an order to the master or owner to produce them. And a seaman, when plaintiff, cannot be nonsuited for not producing the articles.

29. By a recent act, (*k*) some facilities are given to

(*k*) 59 Geo. III. c. 58.

seamen for the recovery of their wages. In all cases, where the wages do not exceed twenty pounds, they may apply to a justice of the peace, who, upon a due hearing, may thereupon issue an order to the master and owner for immediate payment; and, in case of their disobedience, may levy such money by distress. And the determination of the justice or justices is to be final, unless an appeal be interposed by either party to the High Court of Admiralty within the space of seven days after the order made.

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Such are the principal rules of law as respect the ship, the master, and seamen, absolutely considered; that is to say, without reference to any contract respecting the ship, or her employment by the merchant. And this leads us to a brief review of our third and last part.

III. OF MARITIME CONTRACTS.

WE now arrive at maritime contracts, the third division in the natural order of our subject. The contracts by which ships are employed are Charter-parties and Bills of Lading; the duties of owners under such contracts are a due and careful loading, voyage, and delivery; and the duties of merchants are to pay such freight as may be owing under their contract, and such demurrage, salvage, and general average, as the occasion of the voyage may produce. Under this consideration of our subject matter, it distinguishes itself into the five heads of, 1. Charter-parties, and Bills of Lading, 2. Demurrage, 3. Freight, 4. General Average, and, 5. Salvage. To which may be added, from its important use and frequent occurrence, 6. The right of the unpaid consignor to stop *in transitu*.

Introduction
to Part III.
Of Maritime
Contracts.

And, First, of Charter-parties and Bills of Lading.

1. A charter-party is a contract for the letting to freight the whole or part of a ship, for one or more voyages. It is so called from the ancient practice of having such deed divided longitudinally into two parts, along an indented line drawn through the middle of the writing, one of which parts was given to the owner, and the other to the

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merchant. Such charter-party is universally in writing; but it is immaterial whether it be by instrument under seal, or by writing only. If by deed, it is either by a deed *inter partes*, or a deed-poll. A deed *inter partes* binds only the parties to the deed, and covenants or grants only as respects them. But a deed-poll may make a grant to any one, though not a party to it. But the owner, though not a party to a deed *inter partes* between the master and the merchant, may sue upon the covenants expressed to be made for his account by the master; the distinction being, that he is a party to the covenants of the deed, though not to the obligation. In home ports, the charter-parties are usually made between the owner and merchant; in foreign ports, between the master and merchant. In the latter case, the contract is seldom under seal.

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parties.

2. The formal parts of a charter-party are the following: 1. The premises, which specify the parties to the deed; their character as master, owner, and merchant; and the name, burthen, and tonnage of the vessel. 2. The letting of the ship for the voyage or voyages; and the freight, whether it be a gross sum for the whole voyage, or so much for any division of time or tonnage, or bale of goods. 3. The stipulations on the part of the owner or master for the seaworthiness and due appointment of the ship in all necessities for the voyage; for the due lading, departure, and delivery at the destined port, certain perils and accidents excepted. 4. The stipulations of the merchant, that he will furnish a cargo, and will unload the goods within a reasonable time, and pay the freight and demurrage agreed upon. 5. The penal clause, by which the parties bind themselves in a specified penalty for the faithful performance of their respective covenants.

3. The principal questions under charter-parties, and the main source of all the cases, arise under the heads of the duties of the master and owner by virtue of such deeds; the exceptions to their liability, and the degree in which their service is affected by an imperfect performance of the voyage agreed upon, or goods carried. As respects

the duties of the master and owner under the charter-party, they are contained either in the express terms of the charter-party ; or, at least, are immediately deducible from them. These duties distribute themselves under the four divisions, of the seaworthiness and due appointment of the ship ; the loading ; the voyage ; and the delivery.

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4. As regards the seaworthiness and due appointment of the ship in all necessities, the stipulation is, that the ship shall be tight, staunch, and strong ; sufficiently manned ; and every way fitted, for the voyage. This covenant comprehends not only the hull, rigging, stores, and crew, but all the necessary papers, of which the ship must be possessed to be allowed to enter the port of destination ; such as bills of health, &c. And as respects the crew, they must not only be sufficient in number, but in skill ; the captain must be duly qualified, and so must the seamen. And as the seaworthiness of the ship is a common law duty, the law will not allow it to be indirectly and consequentially diminished and reduced by any of those precautionary notices and restrictions of liability, which have become too common amongst land-carriers. In such cases, the courts will hold that the common law duty is a preliminary and almost indispensable engagement ; and that the precautionary notice must be regarded as applying to some other liabilities ; a principle which some recent decisions have very wisely extended into cases of carriers by land.

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parties.

5. As respects the loading of the vessel, it is the duty of the master to receive his lading according to the custom of the particular place ; sometimes from the wharf or docks ; sometimes from the beach ; sometimes from the craft at the vessel's side. The master is responsible for theft and robbery whilst in port ; the sole custody being necessarily in him, as the goods are out of the dominion of the freighters. The due lading likewise includes proper stowage, packing, &c. according to the custom of the port, the course of business, and the usage of trade.

6. As regards the voyage, the master is bound to use

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proper expedition, and not to deviate or delay. But a deviation for the repairs of the ship, or necessary refuge from the perils of the sea or enemy, is of course not only an excuse, but a duty. He must likewise take proper care of the cargo during the voyage, and is responsible for all injuries within his means of prevention; for injury by vermin for example, unless he shall have taken all due care to extirpate them. In the same manner, he is answerable for goods stolen and embezzled. In short, for any damage or injury arising from negligence, or absence of due skill.

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7. As respects the delivery, the master is bound to take the same care in the delivery of the cargo, as in receiving it on board. In ordinary cases, he is not bound to part with the goods till the payment of the freight: and therefore, if he have reasonable cause to doubt the solvency of the assigns of the cargo, it is his duty to retain the goods till payment, if payment is to be received by *him* from *them*. But as much inconvenience would ensue from the delay of the ship, the usage is, that he may in such case land the goods in some public dock or wharf; and there give them in custody to the wharfinger or dock keeper, with an order not to part with them till the payment of the freight. The lien is then continued in the master and owners through the custody and possession of the wharfinger as his agent. In the same manner, if goods on board of ship are taken out of the ship *invito* the master, and by compulsion of law, or the authority of an act of parliament, the lien will be preserved in the *place*, and in the *hands*, where the law has deposited them. This holds in the case of goods landed to secure the duties in the public docks. The master's responsibility continues till the goods are delivered to the consignee, according to the ordinary usage of the trade, or the custom of the voyage; that is, either to his wharfinger or his servants, either in boats or on land. Such are the general duties of masters and owners under charter-parties.

8. As regards the exceptions to charter-parties; or the

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restriction upon these duties, such exceptions are made partly by an express clause in the charter-party or bill of lading, and partly by certain acts of parliament, which have been passed to limit the common law liability of masters and owners as carriers by sea. The exception by clause in the charter-party usually runs in these words:—

That the master will make right and true delivery, “ the act of God, and the king’s enemies ; the dangers and accidents of the seas, rivers, and navigation ; the restraints and detention of kings, rulers, and republics ; and all and every other *unavoidable* dangers and accidents excepted.”

The act of God here comprehends all sudden accidents, such as lightning, earthquakes, hurricanes, &c. perils of the seas, and all such accidents as arise from the sea and winds ; such as wreck, stranding, collision of vessels with each other ; leakage from rough seas ; in a word, all such accidents as may arise from the elements, and which cannot be prevented or avoided by any due care, vigilance, or skill of the master and mariners ; and are in no degree occasioned by ignorance, neglect, or wilfulness. But destruction of a vessel by worms or vermin is no peril of the sea. Robbery by pirates is a peril of the sea ; and so, likewise, the robbery of goods landed in the case of wreck. And it is to be further observed of this exceptive clause, that it exempts the master and owners from liability in damages for the *non-performance* only, and in no case supplies the place of *actual* performance ; and, therefore, where the accidents and perils of the sea have prevented the performance of the specific service, this clause will not operate to entitle the owner to the freight where the service has not been rendered ; but only to excuse him from liability in damages for the part unperformed. But where the cargo has been brought home, but much damaged by the sea, such damage by sea will not be deemed any non-performance of the service ; but a damage from one of those accidents which is covered by the clause of exceptions. On the other hand, if the vessel be compelled to return without reaching her destined port, it is a non-

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performance of the voyage; and though the exceptive clause may exempt the masters and owners from any liability in damages, it gives them no claim for any freight.

9. And this leads us to the last and principal consideration in the nature of charter-parties, namely, the degree in which the service actually rendered is affected by the non-performance of the whole voyage agreed upon. This accident, of such frequent occurrence, seems to distribute itself into three main forms; first, the non-conclusion of the voyage; secondly, its actual conclusion, but with the omission of some of the conditions stipulated; and, thirdly, the complete performance of the voyage and its conditions, but with the cargo damaged or spoiled so as to render the voyage nearly or totally without benefit to the merchant.

10. As respects the first of these points, the non-performance of the whole voyage, the rule of law is; that as a man may contract for what he pleases, and to what extent he pleases, within lawful subject matter, so he shall be holden bound to execute his contract in the stipulated extent; and, therefore, if he have rendered his contract a wager or venture; if he have made it in the proverbial but expressive terms *no cure no pay*; (that is, if there be no conclusion of the whole service agreed for, then there shall be no payment for the part executed,) in such case he shall be bound by his covenants, and their legal import. If a master or owner, therefore, make any specific covenant, he is bound to the performance against all excuses. He must either perform or satisfy the breach; or (where the defect is in the conclusion of some whole voyage or service,) he can claim no remuneration for the part actually performed. And where the contract undertakes for some specific thing, and contains no exception, the law will always give it the construction,—that the party, so absolutely contracting, intended to bind himself against all events; and, therefore, must lose the consideration, or satisfy in damages according to the nature of the engagement. This is the rule of specific covenants.

11. As to the second point, namely, the actual conclusion of the voyage agreed upon, but with the omission of some of the conditions, the question in such cases is, whether the condition unperformed be a condition precedent, or subsequent and independent. The distinction is, where the condition goes to the whole consideration of the contract, or where it affects it only partially. Where the condition goes only to a part of the consideration, and a breach may be compensated in damages *pro ratâ*, such condition is only a condition independent or subsequent, and the party injured must seek his remedy on the covenant. But where the non-performance of any condition totally alters the nature and quality of the service, and renders it a different thing from the subject agreed for, then such condition is precedent, and the non-performance or breach annuls the contract. The reader will find these distinctions explained at length in the Chapters on Charter-parties and Freight in the body of the Work. The above is merely the substance of the general rule as respects conditions precedent and independent in charter-parties.

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12. As regards the last point, the full completion of the voyage and its conditions, but accompanied with the damage of the cargo; the general rule here is, that as the owners have performed the service, they are entitled to their freight; and if the merchant have sustained an injury, he shall be compensated in damages by a cross action. And upon this principle, in a recent action for the freight of a cargo of fish *totally spoiled*, the late Lord Ellenborough decided that the owner was entitled to recover for the freight, and that the freighter must bring his cross action for the damages, but could not withhold the payment of freight. But if a master be commissioned to bring one thing, and bring another; or to go to one port, and go to another; or generally to execute a service in one way, and execute it in another; it is no performance of the contract; and, therefore, nothing is due for it under the contract.

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Lading.

As respects bills of lading :—

13. As charter-parties are the instruments by which ships are let; so bills of lading are the formal receipts and acknowledgments by the master that he has received such goods on board on account of the freighters; and will deliver them to their order or assigns, with an exception of accidents by the act of God, king's enemies, &c. as by charter-parties. When a ship is hired by charter-party, such bill of lading is given by the master to the merchant freighter. When goods are sent by a general ship, that is to say, without any charter-party, but as goods are sent by a land carrier, such bill of lading is likewise given by the master to the several freighters. In both cases, therefore, it is the title and document of the goods sent; and, as such, is transferable in the market. There are commonly three bills of lading; one for the freighter; another for the consignee, factor, or agent abroad; and a third is usually kept by the master for his own use.

14. It will be seen in the body of the Work, that when goods are shipped to be carried abroad by a merchant resident in this country, or are sent from one part of the kingdom to another, the persons to whom they are sent must necessarily be in one of the three relations to the merchant by whom they are transmitted. They may be buyers; they may be his correspondents or consignees, with mutual dealings; or they may be merely his factors, agents, or brokers; and in the latter character, having given no value for the cargo, are only his agents for the sale of it. But under all these cases, a *bond fide* holder of a bill of lading, derived from the indorsement of any of them, is entitled to the cargo; and may claim it from the master, if he can prove that he has purchased it for a good consideration. The transferable nature of bills of lading puts them within the analogy of bills of exchange; and being within the reason of them, they have this main property of bills of exchange; that the indorsee of a bill of lading for a valuable consideration has not to

look to the title of the indorser. And, therefore, if a factor make an absolute indorsement of a bill of lading for a *bonâ fide* consideration, such indorsement will be good to pass the property, though the property should be at sea at the time, or the factor should afterwards embezzle the amount, and have acted dishonestly as respects his principal. For factors are the servants and trusted agents of their principals; and upon all mercantile principles their acts within their implied commission bind their consignors; and any sale by them, being a sale by those commissioned to sell, must in all ordinary circumstances be valid and absolute.

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15. The equitable right of a creditor, or of a correspondent with mutual dealings, is effectually as good as that of a purchaser; and, therefore, the law regards it with the same favour. Upon this principle, the indorsement and delivery of a *bill of lading* to a creditor conveys the property in the goods from the time of the delivery. And it conveys it much more largely than an original purchase upon credit. In the case of a purchase upon credit; that is, by bills of exchange or open credit, the property may be stopped *in transitu* by an unpaid consignor, in case the bills should turn out worthless before the ultimate delivery of the goods. But, in case of an indorsement to a creditor, the consignor, except in very particular circumstances, such as fraud, cannot stop *in transitu*, as the Court will hold such a previous debt to be equivalent to an actual payment.

16. Until a very recent act, 4 Geo. 4. c. 83, a very main distinction was taken between the power of a factor or consignee to sell the cargo, and to pledge it. For the benefit of general commerce, and in order to give a necessary efficacy to the acts of a factor, the law made an indorsement and sale by him in all cases effectual. This power of a factor, indeed, rests upon its expediency; first, as it is a consequence of the relation of principal and agent; and, secondly, from the necessity of such powers for the purposes of trade and commerce. But it was held, and perhaps very justly, that neither of these

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reasons applied to the case of a pledge of goods by a factor. It was neither within his understood commission as an agent; nor was it necessary for the general purposes of commerce. But under the late act the law is, that in all cases where the factor or consignee shall have the apparent controul and dominion of the cargo, the pledge or deposit by him shall be considered to a certain extent as effectual as a sale. The act 4 Geo. 4. c. 83. establishes indeed these three rules with respect to the powers of consignees and factors to hold in lien, and to pledge the goods of their principals. 1. That persons, in whose names goods are shipped, shall be deemed to be the true owners, so as to entitle consignees to a lien in respect of their advances, either of money or negotiable securities received by the shippers to the use of the consignees, provided the consignees have no notice that the consignor is not the actual proprietors of such goods. 2. That any person may take goods, or a bill of lading, in deposit from any consignee; but shall not acquire any further right than the consignee possessed. 3. But the act preserves the right of the true owner to follow his goods, whilst in the hands of his agent, or of his assignees in case of bankruptcy, or to recover them from the assignees, upon paying the advances secured upon them. These are indeed most important innovations on the law of principal and agent; and it remains to be proved, whether the effects will justify the alterations.

17. But an indorsement of a bill of lading by a factor must necessarily be for good consideration and *bonâ fide*; and, therefore, if it be known to the indorsee that the factor is doing an unauthorised act; or if the factor himself shall acknowledge to him that he is making such indorsement upon his own account, and intends, or expects, to indemnify his principal from some other means; in a word, if there be any fraud or notice to the indorsee,—in all such cases, the fraud of the factor being known to the assignee renders the indorsement a fraudulent act, and of course a void contract. Upon the same principle, if any condition be expressed in a bill of lading, so that the

bill carries a notice of its limitation upon the face of it, there the indorsee must take such bill of lading subject to the qualifications expressed.

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Such is the nature of charter-parties and bills of lading, and such their leading principles.

SECONDLY, Of Demurrage.

1. Demurrage is the compensation due to a ship-owner by a freighter, for delaying his vessel beyond the time expressed in the charter-party or bill of lading. Demurrage, in fact, is nothing more than an extended freight. It is unnecessary to say any thing of the principle upon which it rests; it being an obvious legal right that such extra service should receive a proportionate remuneration.

Of Demur-
rage.

2. As to the occasion under which such demurrage may be claimed, it is one of those obligations which arises as frequently from the mere casualty of the merchant, as from his misconduct. The general rule is, that all delay from the casualties of the voyage, that is, between port and port, belong to the ship and owner; and that all delays at the port, from whatever cause, the ship being there, and ready to receive or deliver her cargo, belong to the merchant. Upon this principle, if the vessel be delayed by the crowded state of the docks or river, the merchant, though not in fault, must pay demurrage for such delay. In the same manner, if the vessel be frozen in a port or a river whilst delivering her cargo. In the same manner, if there be any delay in unloading, from whatever cause, such as an hindrance by custom-house officers, or the want of some necessary papers which it is the duty of the merchant to provide.

3. The greater number of charter-parties express the time to be allowed for unloading the ship in one of the three following modes: 1. That the merchant shall be allowed so many specified days for loading and unloading; and so many further days, for which the freighter, if he detain the vessel, shall pay at the rate of so much per day demurrage. 2. That the ship shall be unloaded and discharged within the usual and customary time of ships

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in the port of delivery and discharge; or, simply, within the usual and customary time, &c. 3. In some charter-parties no stipulated time whatever is mentioned, nor any general terms, such as "within the usual and customary time of unloading at the port of discharge," or "within a reasonable time," or words of the like import.

Of Demur-
rage.

4. Under charter-parties of the first description, namely, where a certain number of days is allowed in the first instance, and so many further days, for which demurrage is to be paid, at a certain rate *per diem*, there is no difficulty; as the demurrage in such cases will be due according to the delay, and at the rate expressed. If the vessel be delayed beyond the "further days" mentioned, the rate of demurrage will still be *prima facie* what is expressed in the charter-party for the days mentioned. But as the parties have not specifically agreed for this extra time (namely, the time after the "further days,") it will be open to the ship-owner to shew that he has sustained more damage, and to the freighter to shew that there has been less.

5. Under charter-parties of the second description, that is to say, where it is stipulated that the ship shall be unloaded and discharged within the usual and customary time, or within a reasonable time; there the freighter will not be liable for any delay, which may arise from the ordinary course of business in the port or custom-house of the place of discharge. But any unusual delay will constitute demurrage under charter-parties so constructed; the stipulation only being, that the usual, customary, or reasonable time should be allowed. The term *reasonable* will be considered as only a synonymous adjunct of the terms *usual* and *customary*, and will not cover any casualty which does not belong to the ordinary course of business.

6. Under charter-parties of the third description, namely, where no time is stipulated for the vessels to discharge, nor any general terms employed, such as "within the usual customary and reasonable time;" the implied con-

tract on the part of the freighter will be taken to be, that he will discharge the ship in the usual and customary time for unloading such cargo. But the limitation abovementioned must be here likewise understood, namely, that any casualty, not in the usual course of business, such as being frozen in the river, being detained by the officers of the customs, or having to wait for papers or licences belonging to the cargo, is not comprehended within the terms,—of usual, customary, and reasonable time.

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Of Demurrage.

7. As the accidents of the winds and seas belong to the ship-owner, no demurrage of course can be claimed of the freighter for delay under causes of this kind. Upon the same principle, he is not liable for delay occasioned by waiting for convoy, by hostile detention, or capture and re-capture. If the act of God happen upon the seas, it is the incident of the ship and owner; and the freighter is not liable for the delay. If it happen in port, whilst *loading or unloading*, for example, as abovementioned in the case of being frozen in, &c. it is the casualty of the freighter.

8. Freighters under bills of lading are subject to the same demurrage as freighters under charter-parties, where the claim for demurrage arises on the contract; and, therefore, if the cargo or goods be not taken out in time, the holders of bills of lading will be liable *pro rata* for the delay. Nor is it necessary that the master should give notice to such freighters of the arrival of his ship; the bill of lading being a sufficient notice to them, and the arrival of ships being matter of public notoriety.

THIRDLY, Of Freight.

1. Freight is the compensation to the owner for the hire of his ship, in part or whole. It is sometimes due in whole, and sometimes only in part: but in all cases the owner, or master, whilst in possession of the goods, and provided that he has made no contract inconsistent with such right, has his lien for the freight due. Under this consideration, freight is divided into the four heads:

Of Freight.

1. The cases in which the entire freight is due; 2. In

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what cases part only can be claimed; 3. By whom payable; and, 4. Of the lien for freight, and the action which may be maintained for it.

Of Freight.

2. As to the cases in which the whole freight is due, the doctrine of whole and part freight rests entirely upon the following principle; which, for the sake of order, is here repeated from the second part of this Work. In order to explain the principle upon which the law of these cases rests, it may be useful to observe, that the labour or service rendered, for hire, by one man to another, is necessarily one of two descriptions: either it is beneficial to the hirer, *pro ratâ*, in such part of it as may have been done; or it is totally fruitless, and without benefit to him, unless the whole service be completed. If a builder, for example, be employed to build a house, but by some accident, or his own wilfulness, should leave the work when he has only completed three parts of it, such three parts of it are manifestly of proportionate value to his employers; he may accordingly recover *pro ratâ* for the work done, although he has not completed it. But if a person contract with a carrier or messenger, that a package shall be delivered to some distant correspondent, and such carrier or messenger go only part of the way, or from error, or some other cause, return without the due delivery of the package, it is here manifest that the service is wholly useless, and without benefit to his employer; and that, in not having done all, he has in fact done nothing. In this latter case, therefore, as no service has been rendered, there is neither a legal nor equitable claim for any remuneration; the express contract of the employer being, that he would only pay for the performance of the service, and there manifestly being no implied contract that he should pay for that from which he derives no benefit.

3. The contract for the conveyance of merchandize is, therefore, in its nature an entire contract of this kind; and, accordingly, unless it be completely performed by the delivery of the goods at the place of destination, the merchant is not bound to pay freight, because he has de-

rived no benefit from the time and labour employed in a partial conveyance. This is the general principle, and the reason of it; and, if there be some exceptions to the rule, they will be found to rest upon the peculiar equity of the cases in which they occur.

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4. Upon the above principle, if the ship be captured, the owners of course lose their freight, as well as the merchants their goods. But if the vessel be recaptured, and proceed afterwards with the cargo to the place of destination, the right to freight revives, and becomes due upon the completion of the voyage. The same rule extends to a resumption of an interrupted voyage, after the removal of an embargo by which it has been suspended. It may, therefore, be assumed as a general rule, that the whole freight is due, where the whole voyage is performed; but that, if the complete service be not rendered, no freight is due and recoverable, unless the completion of the voyage be prevented by the freighter's own act. Or unless he dispense with the completion of the voyage; or unless the part performance be proportionably beneficial, and the engagement for the *whole service* be not so specific as to exclude all merit from the part performance.

Of Freight.

5. And these exceptions introduce us to the second division of freight; that is, where freight *pro ratâ* is due. Now the general rule under this head is; that the imperfect performance of the voyage or service can only be cured by the acceptance of the merchant, and by his express or implied dispensation with the defective performance, and, therein, his new implied contract to pay *pro ratâ* for the goods and service which he has submitted to receive, such as it is. If the vessel be wrecked, and the goods saved; or if the vessel be unable to conclude her voyage; it is the duty of the owners to tranship the goods, if they possibly can, and send them onward to the port of destination. If they cannot do this, they must apply to the merchant to receive them where they are. If the merchant consent to receive them, the owners will then be entitled to freight *pro ratâ*. But they are not entitled to

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Of Freight.

this freight under the original charter-party; for under their contract they can claim nothing, because in not performing the whole service, they have not complied with the specific engagement; and because the exception as to the perils of the seas in the charter-party operates only to relieve them from satisfying any damage by sea, &c. but is not such a substitution for actual performance as to entitle them to freight. The owners, therefore, must be entitled to freight *pro ratâ* under the new contract implied in the acceptance of the goods by the merchant. But if the merchant refuse to accept, or rather to dispense with the completion of the voyage, then the owners must lose their freight: but the merchant must still have his goods, they being his own wherever they may be.

6. But this rule admits exceptions according to the equity of the case. The first class of exceptions comprehends those cases in which the service is in its nature divisible, and where even a partial performance is proportionably beneficial to the freighter. Thus the partial freight will be due when the ship has performed the whole voyage, although she have brought a part only of the merchant's goods in safety to the place of destination; as where, for example, sixty bales are delivered out of an hundred, under which circumstance it is manifest that the freighter has received a proportionate beneficial service, for which he must pay accordingly; and, on the other hand have his action against the owner or master, (if the cause of loss admit it) for the bales undelivered.

7. Where the defective performance is not in the part of a voyage, but in the omission or imperfect execution of some condition, or in the improper performance of the service altogether; the courts of law, as we have observed under a previous head, will take the distinction, whether such condition be precedent, or subsequent and independent; that is to say, whether it extend to the root of the consideration, or only affect and diminish the value of the service. But where the engagement is for one express and specific service, and such service be not rendered,

there freight *pro rata* can never become due except by a new agreement, implied by the acceptance of the goods

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8. Where the whole voyage is performed, and only part of the goods brought, a distinction must be taken whether the ship be a general ship, or hired by charter-party. If a general ship, the freight will be due for the part brought, and the freighter may have an action against the master for the part lost or left behind. But if the ship be a chartered ship, and the charter-party be in the usual terms, it may become doubtful whether the bringing of the part of the goods be more than equivalent to the performance of part of the voyage; and not being a specific performance, whether any freight can be claimed for the part brought. So hard a case, perhaps, cannot easily arise: but if it should, the only remedy on the part of the master would be either to procure the acceptance of the goods brought by the merchant; or to deposit them in some public dock or warehouse until he bring the remainder. If the engagement be specific, that such a cargo shall be brought, it would seem that the owner can have no claim to any freight whatever, unless the whole be brought.

Of Freight.

9. As to the parties entitled to freight, the customary rule is, that the action must, in general, be brought by and against the person with whom the contract is made. If there be a contract of charter-party under seal, the parties to the deed must sue and be sued. But if the contract be not under seal, and made with the master, the action may be brought either in the name of the master or the ship-owner. But where a contract under seal was made by the captain with the freighters on behalf of his owners, it has been decided that the owners cannot maintain *assumpsit* against them for freight; for the charter-party is conclusive, and the implied promise is merged in the specialty.

10. As respects the lien for freight, the general rule is, that the ship-owner has a lien for his freight as long as he retains possession of the goods; and even where the goods

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are taken from him by act of parliament, as by the London and West India dock acts, the law will preserve his lien for him in the place where the goods are deposited. The exceptions to this rule are principally two. The first is, that the ship owner is regarded as having intentionally surrendered his lien, where he has made some special agreement for payment inconsistent with the exercise of the right of lien; as, for example, where he has received bills of exchange, or has engaged to take certain bills at the end of the voyage.

II. The second exception is, where the ship is let under a charter-party so constructed, that not merely the *space* of the ship, but the ship *itself*, is demised and let out to the merchant. In this case the ship-owner loses his lien, because he has in fact parted with the possession of his ship. And it will make no difference, in this respect, although the master and seamen left to navigate the ship be paid by the owner.

FOURTHLY. Of General Average.

General
Average.

1. General average is the apportionment of a particular loss in a sea-venture amongst the several parties to the venture, in the proportion of their several shares of the ship or cargo saved; such loss having been incurred for the benefit and preservation of the whole. Its most usual form is that of *jettison*, or the throwing over board of a portion of the cargo, for the sake of lightening the ship in sea-peril.

2. As the equitable foundation of general average is, that the loss has been suffered by one for the sake of the whole, or that one has made a sacrifice of more than his proportion for the common benefit; so the mere loss or damage of the ship by tempest and sea-peril is not a subject of general average. The reason is, that the damage of the ship belongs peculiarly to the owners; and it is a part of the understood contract between the freighter and owners, that such loss and damage shall be no part of the freighter's venture. The ship-owner is not to make good any loss or damage of the cargo by sea peril; and, upon a

like principle, the freighter is not to contribute towards any loss or damage of the ship from the same cause.

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General
Average.

3. Upon a similar principle, any damage to the ship by fighting off an enemy is not a subject of general average, it being the duty of the master to defend the ship. And, therefore, such defence being relevant to his own duty and interest, and not being any thing extraordinary done for the sake of the cargo, the owners are not entitled to an average contribution.

4. But, though the ship itself from the above causes is very seldom a subject for general average, it is manifest that cases do occur, in which owners may claim a general average for damage incurred by their vessel for the benefit of the cargo, as well as for the ship. And one of these cases is, where the master, for the sake of preserving the cargo, has used and cut up some of his ship tackle or furniture, or voluntarily added to his number of seamen, or hired extra assistance for the preservation of the cargo, in some emergency not within the scope of any ordinary casualty.

5. If a ship be obliged, from whatever cause, for the safety of the whole concern, to return to port, whatever expenses are absolutely essential to enable her to prosecute her voyage may be considered as general average: but if the ship, by such expenditure, gain a lasting benefit, there must be a deduction on that account of so much, which must be placed wholly to the ship-owner's account. Repairs, with the foregoing limitation, constitute a general average: so, likewise, the expenses of unloading the cargo to make such repairs; but not the wages and provisions of the crew, or the like. Such repairs, however, must be merely such as are necessary to enable the ship to prosecute her voyage, and to keep the cargo from damage.

6. Upon these principles, therefore, three things are necessary to constitute any claim upon the ground of general average; first, that there should be a special sacrifice by one or more for the benefit of the whole; secondly, that it should be for the purpose, and with the

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intent, (*causa et mente*) of the preservation of the common concern; thirdly, that the common concern should be benefited by the partial sacrifice.

General
Average.

7. If a ship lose her masts by having them blown away, it is, as above said, no average. But if a mast be cut down, or any part of the cargo thrown overboard in order to save the rest, there will be a general average for the mast and the part so thrown away. Where the cargo is to be charged with general average, the cargo must have received some benefit. Thus, where a ship, which has been damaged at sea so as to be unable to continue her voyage, puts into port to make the repairs *necessary to continue* her voyage, the cargo gains the prosecution of the voyage, and a further and stronger security against sea-damage, which would be most probable upon the ship's proceeding in a shattered state. And the ship, upon its own part, gains greater safety: but this is all it is entitled to gain. General average is here due upon the principle, that such repairs (within the limit only of what is necessary to continue the voyage) are a common benefit, and the means of common safety. A case of this kind would stand upon the same principle as the construction of a raft, or the purchase of another vessel, in the case of shipwreck, for carrying home the passengers and cargo, which of course would be a subject of common contribution.

FIFTHLY. Of Stoppage in Transitu.

Stoppage in
transitu.

1. Stoppage *in transitu* is a right, under which an unpaid vendor, and every one in the character of a vendor, namely, a broker buying goods for another on commission, may exercise the power of stopping his goods upon the insolvency of the vendee; provided only that such stoppage be made before the goods have either actually been delivered, or something have been done on the part of the vendee, or his agents, which amounts to a constructive possession in law.

2. In considering this subject, it naturally distributes itself under the three heads; first, in what cases, and by

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transitu.

what parties, goods may be stopped *in transitu*; secondly, what is a *transitus*, and how far it extends; and, thirdly, what defeats the right, and completes the possession of the vendee, though the goods should not have actually reached his hands. As to the first head, the general rule is, as above stated; that not only every unpaid consignor, but every one in the same equity of character, has the right to stop his goods *in transitu*; either in the event of the insolvency of the buyer, or upon a reasonable apprehension of it. The last limitation is necessary in order to distinguish this right from the power of rescinding the contract, which, after it has once been made, does not exist by the law of England without the consent of the parties.

3. Nor is this right of the unpaid consignor taken away either by a payment in bills, turning out to be worthless, before the delivery of the goods, or by a part payment of the price; as the law does not regard either of these circumstances to be such a conclusion of the sale and delivery to the vendee, as to divest the right of the unsatisfied vendor to stop *in transitu*. Therefore, though the consignee may have paid for the cargo in bills of exchange, the consignor, upon the insolvency of the consignee, before the delivery, may stop it *in transitu*, the law regarding such bills as nothing; and, therefore, leaving the consignor in possession of his original rights.

4. As to the second head under stoppage *in transitu*, namely, how far the *transitus* extends, and where it terminates, the general rule under this head is; that goods are to be deemed in transit so long as they remain in possession of the carrier, or of any agent of the carrier, or of any wharfinger, innkeeper, or any other servant of the public; or in any place of deposit connected with the transmission and delivery of goods; and, finally, until every thing be done (which is required or necessary to be done previously to the delivery, as weighing, sorting, &c.) by the vendor or his agents; and thenceforth, until they arrive at the actual or constructive possession of the vendee.

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5. Upon the above principle goods may not only be stopped whilst in the hands of the master, and on board the ship; but if he have landed them on any wharf, whence they are to be sent by the wharfinger to the consignee, the unpaid consignor may still stop them *in transitu*, although they may have been delivered to the wharfinger as the goods of the consignee.

6. Nor is the *transitus* determined by the delivery of goods on board a chartered ship, unless where the ship is so completely out of the possession of the ship-owners, and so entirely in possession of the freighter, as to have become equivalent to his own vehicle or warehouse. But if the freighter or consignee have only a charter of the whole *space* of the vessel, and not of the *hull* of the ship, that is, the ship not being demised and let out to the freighter as an *entirety*, but only occupied, as it were, by an universal bill of lading of the whole *capacity* of the ship, and the master and seamen remain servants in possession for the owners; there an unpaid consignor may stop the goods *in transitu* on board such vessel.

7. Upon the principle that the *transitus* continues so long as any thing remains to be done by the vendor or his agents, an unpaid consignor may stop goods *in transitu*, where, after sale from the warehouse of his broker, the goods remain unweighed, unmeasured, or unsorted; if weighing, measuring, and sorting, be necessary to the execution and conclusion of the contract.

8. Nor will an unpaid consignor be divested of his right of stopping *in transitu* by any mistake of the master in delivering the goods, after timely notice by the vendor, that he intends to exercise the right of stoppage; nor by any fraudulent anticipation of the consignee, in taking possession of the cargo before its arrival. In the first case, the courts of law will hold the delivery to be no delivery, as being made under the mere mistake of the carrier. And in the second case, the courts will consider any anticipated possession of the cargo, at a port short of the port of destination, to be a surprise upon the consignor.

9. As to the third head of stoppage *in transitu*, namely, what shall defeat the right of an unpaid vendor to stop *in transitu*; the general rule is, that not only the assignment of the bill of lading for a valuable consideration, but every act which amounts to a constructive possession, and is not meant to operate otherwise, such as a delivery of the goods to the consignee's agent, or servant, marking the goods, &c., will defeat the consignor's right of stopping *in transitu*; although the goods shall be still in actual passage, and may not have reached their port of destination.

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10. Upon the above principle, if a consignee, having in possession a bill of lading, indorse it over to a third person for a valuable consideration, such indorsement will pass the goods to such third person; and though the consignor be unpaid, and the consignee become bankrupt before the arrival of the goods, the right to stop *in transitu* is effectually gone; the transaction between the consignee and indorsee of the bill of lading being *bona fide*.

11. Upon the second qualification of the rule above stated, it is not necessary for the consignee to make an actual removal of the cargo in order to vest his possession, and to determine the right of stopping *in transitu*. If he take a constructive possession, such as putting his mark upon the goods, paying warehouse rent for them, or exercising any unequivocal act of dominion over them, it will be sufficient to render the delivery complete, and thereby to divest the right of the consignor to stop *in transitu*.

12. And as, from the nature of all contracts, an acceptance is necessary to complete and terminate the contract, and as the contract between consignor and consignee, so far as respects the right of stopping *in transitu*, is presumed by law to be suspended till a complete delivery; so a vendee, who may find himself in embarrassed circumstances at the time of arrival, may waive the acceptance of the goods, and leave them for the consignor.

Lastly, Of Salvage.

1. Salvage is the compensation payable by merchants and ship-owners to those who may have saved their ship

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and cargo from wreck or capture. The right to such compensation is founded in law upon these two principles; —first, that every one has a just claim to be paid for his labour in the service of another; and that the rate should have a due relation, not only to the *quantum* of the labour, but likewise to its quality; that is to say, whether labour of body or labour of mind, or of both; and whether mere service, or service accompanied with danger, enterprise, and skill. The second principle is, that salvors of this kind ought to be encouraged by liberal rewards, from a just regard to the maritime interests of the country, and in order that ships and their cargoes, and more particularly human lives, may be saved from perishing.

2. As the occasions for the exercise of salvage are chiefly two, namely, wreck and capture, the subject of salvage naturally divides itself, and is accordingly treated by all maritime writers, under the two corresponding heads, of salvage in case of wreck, and salvage in case of capture.

3. As to salvage in case of wreck, it admits in practice of an important subdivision into two classes: the first, where the wreck or danger is on the shore, or at least immediately off the coast; and the second, where the wreck or danger occurs in mid-sea, and the vessel is saved by the crew of some other vessel.

4. In the first of these cases, salvage is given by several acts of parliament, the enactments of which will be found in this Work under the head Salvage. It is sufficient to observe in this place, that by virtue of these acts all sheriffs, justices of the peace, constables, custom-house officers, and commanders of king's ships, are directed to give ready and immediate assistance, in case of wrecks or danger off the coast; and that a reasonable reward, to be adjusted by three justices, shall be paid to any and all persons so rendering their assistance in the event of the preservation of the ship or cargo, or, proportionately, for any part of either.

5. In salvage in the case of wreck or danger in the

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mid-sea, if the parties cannot agree amongst themselves as to the compensation to be made, the salvors may apply to the Court of Admiralty; who, upon a due enquiry into all the particulars, will make a decree according to the circumstances of the case. In the case of a derelict, where the danger is inconsiderable, and the abandonment has been injudicious, the court will generally give about two-fifths of the value of the ship and cargo saved. In a case of greater danger, the same court has sometime given as much as two-thirds. But it is a rule with this court to be liberal in cases of this kind, as the danger is usually extreme, and the relief nearly hopeless. The general rule on this subject is, that the rate of salvage on derelict is discretionary by the modern practice in the Admiralty courts: the ancient rule of giving a moiety *de jure* to the salvors being overruled by later practice.

6. As respect crews and passengers, they can in no case be either salvors, or joint-salvors. The crew cannot have any claim to salvage, because it is their duty to protect the ship and cargo through all perils; and the whole of their service is engaged to the master and owners. The same reason extends in a great degree to passengers, who share the peril, and must share the duty. But if a passenger exceed what may fairly and reasonably be expected of him, as his portion of common labour to a common peril and its consequences, he may, under such circumstances, become entitled to a reward in the nature of salvage.

7. As to the persons who are to contribute to salvage, the reward must be paid by those who receive the benefit of the service. Salvage is a compensation to the salvors, not merely for the restitution of the property which has been made by them to the prior owners, (for that is properly an act of mere justice on their part,) but for the risk and hazard incurred by them, and for the beneficial service they have rendered to the former owners in rescuing their property from the danger in which it has been involved. The persons, therefore, to contribute to salvage, are the

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persons who would have borne the loss had there been no such rescue, and who of course reap the benefit of such rescue. But salvage must not be confounded with mere acts of pilotage.

8. As to the second case of salvage, namely, salvage in the case of capture and recapture, the rate of salvage to be paid to the captors is settled by certain acts of parliament passed for that purpose; the principal of which is, the 48 Geo. III. c. 132. It will be sufficient to observe in this summary, that the rate of salvage in the case of capture and recapture, as fixed by acts of parliament, is one-eighth part of the value of the ship and cargo, in the case of such recapture being made by a king's ship; and one-sixth part of the value of ship and cargo, if such recapture be made by a privateer.

9. It is a principle, that in the case of one vessel saved by another, the master and crew are strictly the only salvors. The owners claim only under the equitable consideration of the court, for the risk of their vessel, &c.; and the court is not disposed to allow their claim to any great amount.

10. If a ship captured by the enemy be voluntarily abandoned by him at sea, after taking out the crew, either because he may be unable, or may not think it worth while to carry her into port; and she be found, and taken possession of, by a British ship of war; this is not a recapture within the act of Parliament; and the Court of Admiralty is not restricted as to the rate of salvage, but may apportion it to the nature and merits of the case.

Conclusion of
the Introduc-
tion.

Such is the general system of our Shipping and Navigation Laws, and the Maritime Contracts to which they give occasion. It may be justly observed that the basis, and, as it were, the great charter of the whole system, is the Navigation Laws; and that the Registry acts,

and the regulations for merchant shipping, are only to be valued, as their aim is to uphold and enforce these admirable institutions. The Navigation Act, in like manner with many of our laws of constitutional liberty, arose in times of popular commotion; and, from the effect of political causes, was the source of many bloody wars with our maritime rivals, the Dutch. But succeeding kings and parliaments, acknowledging its wisdom, and respecting the patriotic spirit in which it originated, have considered it no less a measure of good policy, than a proper maintenance of the public interests, to give it upon every suitable occasion a larger compass and a firmer root; and so to direct and guide its growth into our system, that it might be sustained by one common trunk, and supported by intertwining its branches with the spreading tree of British liberty.

Conclusion of
the introduction.

The Author of this Treatise having now executed a summary, which he trusts may be of some use, not only to the general reader, but to the profession,—inasmuch as he has endeavoured to make it comprehend, in a condensed form, a portion of the whole of a very ample subject,—it becomes a duty of justice in him to acknowledge his obligations to preceding writers.

The first of these in order is Mr. Reeves, who, in his admirable Treatise on the Navigation Laws, was the first to reduce the numerous statutes and regulations relating to our trade and commerce into order and arrangement. Independently of the learning and research of this writer, it is not his least merit that, though his various acquirements and genius rendered him capable of adorning a subject even more sterile and unpromising than the Navigation Laws, he has had the good taste, and grave and correct judgment, to confine himself to that sober and didactic style adapted for the purposes of business and utility. His work is, perhaps, infinitely more valued than known. It is one of those productions which might have proceeded from the closet of a statesman; and must always

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be considered as a most valuable contribution to the Board of Trade, and to the English laws of Navigation and Commerce.

The Work, next in order of time, and in the use which the Author has made of it, is the Treatise on the law of Merchant Ships and Seamen, by Mr. Abbott, now Lord Chief Justice of the King's Bench. It is only to repeat the established opinion of the public and profession to say of this Work that, as far as it extends, it has perfectly exhausted the subject, and left nothing to following writers within the same compass of subject matter, but to illustrate and confirm his principles by new cases. The Author would deem it to be a want of due modesty to enter into a criticism upon a Work of such established fame; and he shall feel that he has accomplished all that he could ever intend or hope, if he shall be considered to have followed, not unworthily, in the same track.

LAW OF NAVIGATION,

Merchant Shipping,

AND

MARITIME CONTRACTS.

PART I.

CHAPTER I.

NAVIGATION LAWS.

1. NO part of the English law has been less understood by the writers upon general policy than our law of shipping and navigation. Almost all the authors upon political oeconomy have regarded this portion of our law in the view of a commercial monopoly; and have demanded how our navy could be permanently maintained and augmented by a system which, in restricting the natural growth of our commerce, must diminish its demand, and therein its supply of ships and mariners. Upon the one part, indeed, it cannot be denied that the effect of this system is to introduce a partial monopoly in favour of British shipping, and to deprive us of advantages which might follow from a less restricted liberty of commerce. But, on the other side, the actual state of our navy and commerce appears to be a conclusive proof against the alleged mischief of such monopoly. With a navy equal to the extent of our empire, we possess a commerce which fills every channel for the possible employment of capital. It is a necessary conclusion, therefore, from this comparison, that our legislature

Policy of the
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laws.

Policy of the
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laws.

has succeeded in accomplishing both objects of our insular policy; and has maintained and augmented our naval strength, without the sacrifice of our trade and commerce. A due examination of our law of shipping and navigation will justify this inference.

It will appear that the main object of the navigation laws was, primarily at least, not commercial, but political: that in a more remote period our commerce was, perhaps, too directly sacrificed to the growth of our navy; but that, in later times, when our navy had become more adequate to our national defence, and when commercial principles were better understood, the legislature has endeavoured to reconcile the two objects, and to support our naval establishment, with as little cost as possible to our commercial interests. Having two proposed objects, and these in some degree opposed to each other, the maintenance and augmentation of our navy, and the liberty of commerce, the legislature has deemed it wise to favour the former; and in this choice has preferred the interests of our national defence; not indeed to the interests of our whole commerce, but to that portion of them which would have resulted from a perfect liberty in the carrying trade. In almost all legislative measures they have kept the same principle within their view; and, where the two objects have come into competition, they have merely adhered to their first preference, and have required our merchants to concede something of the interests of trade, in order to advance and uphold the greater interest of the common defence.

Under this system, thus qualified by the prudence of the legislature, both objects have been happily accomplished. Our navy has been maintained and augmented in the degree required by our national policy; and the basis of our commerce has become so extended, our mercantile capital so enlarged, and our shipping and mariners so great and numerous, as effectually to counteract the evil of a restrictive system; and, in despite of the navigation laws, to render any monopoly in the carrying trade difficult, and almost impossible.

It is not within the subject of a legal work to discuss at any length the policy of the law which it professes to develope and explain. But it may be permitted to make these observations in answer to some arguments which have been revived against this system. The interests of mere commerce are certainly best advanced by a full and perfect liberty of trade: but national defence is a still greater interest than commerce itself. Something of the less object may, therefore, be wisely sacrificed in favour of the greater; and the legislature performs all that can be demanded of

it, when, in pursuit of a greater good, it takes no more from the less than is required by the preference, and applies itself to correct (as they arise) the evils incidental upon its choice.

II. The law of shipping and navigation, as at present established, seems only to have commenced with the celebrated navigation act in the long parliament; and those who have written upon this subject of our law have generally proceeded from this period. But, upon an examination of our statutes, it will appear that some at least of the principles of this act had an earlier origin. Our insular situation, indeed, must have always suggested two main objects of our policy,—a navy and commerce. Accordingly, from very early times, one or other of these interests has become the favourite object of our kings and parliament. They have been pursued, perhaps, with less intelligence, and with less distinct views, than in more recent times: but it will appear that they have always been seen and acknowledged; and that the system of preference and exclusion is not, therefore, so entirely, as has been imagined, the creature of Cromwell and his parliament. Origin and antiquity.

The acknowledged object of all our navigation laws has been the maintenance and increase of the navy; and, in one form or other, all the acts employ the same means, the preference of English ships or mariners, in English exports or imports. In the earlier acts this preference is expressed in the most full, simple, and absolute terms, with little consideration of any just commercial principles; and with a very loose, general, and inaccurate description of the subject matter of the statutes. As commerce proceeded, and as the effects of general prohibitions became manifest from experience, the navigation acts became more qualified in their prohibitions, and more precise in their description. A just distinction was taken between foreign merchants importing their own goods, and acting as carriers for others. The employment of their own shipping by foreigners was permitted, because it was required by commercial interests, and was the natural and proper use of their own means. But the carrying trade by foreigners was strictly prohibited, because a maritime people, like ourselves, were in a condition to become our own carriers; and because one of the national advantages of commerce is, that it should thus administer to the general defence. The first act of navigation was the 5th of Richard 2. s. 1. c. 3. by which it is enacted that none other than English ships shall be employed in sending out or fetching home merchandize, *so long as such ships could be found in sufficient number*. The second act of any importance was the first of Henry 7th, by which not only the ships were to be English,

but the mariners were required to be so likewise. The third was the 23d of Eliz. c. 7., by which it is enacted that *for the increase of mariners, and maintenance of navigation*, our merchants should employ only their own fishermen, and should buy no salted fish in foreign parts. These several acts were confirmed by others in the reign of James the First, and thus directly led the way to the famous navigation act, 12 Car. 2. c. 18.

Progress.

III. It is, indeed, but justice to ourselves to state, that our navigation laws, as they now exist, have been only gradually formed to their present shape and policy; and that, in early times, their object was neither very clearly seen, nor very consistently followed. Our writers upon law have indeed occasionally fallen into the same error with the writers upon our constitution. They have regarded, as belonging to one time, and to one set of men, that which has been the work of generations and centuries; and, could we revive those who are now considered as the fathers of our law and constitution, they would doubtless behold with more admiration than recognition, what we now call their original principles, and their wise foresight for themselves and their remote posterity. If we content ourselves with the grave statement of truth, both as to our law and to our constitution, we shall allow more to the present time, and less to our ancestors. Every age, acting upon the general principles of prudence, and according to the compass of its own knowledge, has provided for its own immediate concerns; has applied a remedy to an actual or imminent evil, or adopted the most direct means for the attainment of an evident good. As far as respects our navigation laws, this is, perhaps, all we must allow to our ancestors. They have made laws and repealed them, according to the necessities of their own times. But, as their knowledge was not only much less than that of the present times, and as the political relations of the kingdom, and its commercial intercourse, were so much more limited and simple, it is as unjust to ourselves, as absurd in its own nature, to refer to them for the whole reason and policy of a system so artificial and extensive as our present navigation law. The subject matter of our present maritime policy, at least the three principal portions, our colonial and foreign commerce, the coasting trade, and the fisheries, are almost entirely of modern origin, and all the important regulations regarding them are to be sought in modern statutes.

IV. The colonial, or, as it is more generally called by our earlier writers, the plantation trade, received the exclusive character which has since become attached to it, not so much from any

regard of the mother country to the colonies, as from the peculiar circumstances of the origin of such colonies. Such colonies were long considered as belonging more immediately to the crown than to the people: hence the crown deemed itself entitled to any peculiar profit which could be derived from them. All the early regulations of the colonies were made with this view, and are directed to this end. The colonists are commanded to send the whole of their produce to England, "that the staple of their commodities might be made here; and that his majesty, after so great an expense in the plantations, and having so many of his subjects transported thither, might not be defrauded of what was justly due for customs on the goods." (a) The exclusive possession of the colonial trade by the mother country originated, therefore, in these views of revenue, and only in a secondary degree from the supposed family analogy of the parent state and its remote settlement. Hence, not in England only, but in all the old kingdoms of Europe possessing plantations, the colonial system has the same character; these kingdoms encourage the produce of their colonies in preference to the like produce from other states, and, in return, require that these colonies should send their produce exclusively to the mother country.

V. Such was the establishment, from its very commencement, of that branch of our navigation and commerce, which, from its importance both in value and policy, has since become distinguished by the name of our colonial trade and system. Its exclusive character, both as to the exportation of colonial produce, and to the importation of colonial supply, originated rather in views of revenue than in any object of general policy, or any interests of trade and navigation. In the first settlement and discovery of our plantations they were granted, governed, and administered, as so many crown lands: nothing was considered but revenue. A very short experience proved their value to the navigation and commerce of the country. At this period, unfortunately in some circumstances, but not without some good in others, the administration of the kingdom was in the hands of a parliament comprehending many able men; whose ability was seconded and rendered effectual by a contempt of the jealousy and enmity of foreign powers. They saw the peculiar interests of the kingdom as an insular nation, and they resolved to pursue them: they began by completing and securing our exclusive possession of our own colonial trade. They strictly

(a) Instructions to Sir W. Berkeley, governor of Virginia, dated 1639.

confined the colonists to transportation in English bottoms only; and, that they might secure the execution of this law by rendering the transgression of it nearly impossible, they finished this portion of their new system, for such it may be called, by prohibiting all foreign vessels from approaching their colonial ports.

VI. The course of our inquiry now leads us to the celebrated act of navigation passed by the parliament in October 1651; an act which, aiming at the increase of English shipping, and collecting all the previous laws which had been made from the earliest times with the same purpose, at once established that system of maritime policy, which has since undergone no further change, than such a consolidation of its enactments in the statutes recently passed, (3 Geo. 4. cc. 42, 43, 44, and 45, now constituting the actual navigation laws of the present times,) as has been found necessary to render it better accommodated to the state of the world, and the exigencies of general commerce. The first object of this act was to deprive the Dutch of that carrying trade by which they had become the most wealthy nation in Europe. At the period of this act they were the carriers even for the British colonies, and in such a proportion, that of forty vessels from the West Indies thirty-eight are said to have been Dutch. The first object of the parliament was to terminate this monopoly: the second purpose was to enlarge the sphere of employment for English shipping and seamen, by prohibiting all foreign nations from becoming the carriers for each other; confining each nation to the bringing of its own produce only, and thus (as half the nations in Europe had no sufficient vessels of their own) compelling English merchants to fetch in English vessels what their foreign dealers could not transport.

VII. In pursuance of these objects, the act commences with a regulation, which in terms, apparently as equitable as comprehensive and effectual, at once strikes at the root of the evil, and establishes a distinction so plain, so practical, and so sufficient, that in nearly two centuries nothing more has been necessary than to maintain and support it. It first enacts that no goods or commodities whatever, of the growth, production, or manufacture of Asia, Africa, or America, or any part thereof, or of any islands belonging to them, as well English plantations as others, shall be imported into England, Ireland, or any part of the commonwealth, in any other ship or vessel whatsoever, but only in such as do truly, and without fraud, belong only to the people of this commonwealth, or the plantations thereof, as the proprietors or right owners thereof, and whereof the mariners and masters are also, for

the most part of them, of the people of this commonwealth, under the penalty of the forfeiture of the goods and ship.

By the effect of this clause, therefore, the whole import of the productions of three parts of the world was secured to English ships. The next clause is only less extensive with respect to the trade of Europe : it enacts that no goods, the growth, production, or manufacture, of Europe, shall be imported into the commonwealth of England, Ireland, &c. in any ship or vessel whatsoever, but in such as do truly, and without fraud, belong only to the people of this commonwealth, as the true owners and proprietors, and in no other, *except only such foreign ships and vessels as do truly and properly belong to the people of that country, or place, of which the said goods are the growth, production, or manufacture, or to such ports where such goods can only be, and most usually are, first shipped for transportation*, under the penalty of the forfeiture of the goods, and also of the ship in which such goods shall be so brought in and imported. And no goods or commodities which are of foreign growth, production, or manufacture, and which are to be brought into this commonwealth in shipping belonging to the people thereof, shall be by them shipped or brought from any other place or country, but only those of their own growth, production, or manufacture. As the first clause, therefore, took the colonial trade from the Dutch, so this second clause deprived them of being the carriers of Europe, and obliged our merchants to become themselves the carriers for those nations who had no shipping belonging to them. They were compelled, moreover, to fetch all such foreign commodities from the place of their growth or manufacture, instead of, as hitherto, buying them in Holland, which, under this monopoly of the carrying trade, was becoming another Tyre and Sidon.

The act next proceeded to the permanent establishment of our fisheries, by enacting that no cod, ling, herring, pilchard, or any kind of salted fish, should be imported into the commonwealth, or in any of our plantations, but only such as should be caught in vessels that truly belonged to the people of this nation.

The fourth and last object of the ordinance was, the coasting trade, which was rendered equally exclusive to us by a clause enacting that no person should load, or cause to be loaded, in any bottom, ship, or vessel whereof any stranger born (not being a denizen, or naturalized), was owner, part owner, or master, any fish, victual, wares, or things, from any port or creek of this commonwealth to another, under the penalty of forfeiture of the goods.

To these principal clauses were added four provisoes, by which

some certain exemptions were made ; but all, as will be seen, in favour of *English shipping* only.

The first of these clauses was in favour of Levant and East India goods brought in English shipping. By this it was enacted that the act should not restrain the importation of the commodities of the Straits, or Levant seas, laden in the shipping of this nation, at the usual ports or places within the Straits or Levant seas.

The second was in favour of English ships bringing South American goods or produce from Spain and Portugal, or goods and commodities which came from, or belonged to, any of the plantations or dominions of either of those nations.

The third exempted the silk and silk wares brought by land from Italy on account of English merchants. These might be shipped in *English vessels* from Ostend, Rotterdam, &c., the owner in England making oath before the comptrollers of the customs, that the goods were so bought for his account in Italy.

The fourth exempted bullion, and goods taken by way of reprisals, from the operation of the act.

VIII. Such was this act, or ordinance, which is not only the ground work of our present system, but is, in all its divisions and subdivisions, the complete frame of the whole law of navigation as now established.

For the sake of a due order in our future enquiries, and that the Reader may follow us with more ease, we shall conclude these preliminary remarks, by observing that the whole substance and system of our navigation law, even as now established, may be summarily represented and comprehended in the following short analysis.

The object of our navigation laws is the maintenance and increase of our shipping and navy, and the employment of our own mariners. The means by which this object is sought to be established are five :—

First, Exclusion of foreigners from the carrying trade for each other, and the consequent compulsion upon the British merchants to use *British shipping*, in fetching the goods of those nations which have not themselves the means of bringing them.

Secondly, The exclusive supply of the consumption of this country and our islands in salted fish ; or, in other words, the encouragement of our fisheries ; and particularly those of Greenland and Newfoundland.

Thirdly, The exclusive possession of our colonial trade.

Fourthly, The exclusive possession of our coasting trade.

Fifthly, A system of registration, which confines the privilege of British trade to British built ships ; and, by ascertaining the actual

ownership of vessels, keeps them always under the eye of the law, and renders it impossible for foreigners to have such an interest in them as might be prejudicial to the state ; and for merchants or captains to evade the several acts for the preference and encouragement of British ships.

IX. Our enquiry, into the present condition of our laws of shipping and navigation will be directed according to this method. The colonial trade is first in order.

This trade is now regulated by two statutes of the reign of his majesty George the Fourth ; that is, by the 3 Geo. 4. c. 44. and the 3 Geo. 4. c. 45. Under the operation of these statutes, the colonial trade of Great Britain is effectually divided into two main parts. The first of these branches is the trade of British America and the British West Indies with Foreign America and the Foreign West Indies. The second division is the trade of British America and of the British West Indies with Europe and the other parts of the world. Considering our colonial trade to be composed of these two branches, our Legislature, in the two above mentioned acts, has enacted a series of distinct clauses for each ; which, being taken together, constitute our actual colonial law. The object of our old colonial law, and particularly of the act of 12 Car. 2., was to secure, without any qualification whatever, an exclusive and sole possession of the trade to our colonies, both as to our supplying them with European goods, and as to our becoming the staple and market of their produce. The more wise and discreet object of the two recent acts is, to qualify this monopoly according to the actual exigencies of our colonies, and according to the existing relations of our general commerce.

Colonial trade.

As these two acts, as above stated, regard our colonial trade as being composed of two parts, namely, the trade between "British America and British West Indies with Foreign America and Foreign West Indies," and the trade between British America and the British West Indies with Europe and other parts of the globe, we shall here, following the same order, collect the rules of each.

First, Of the trade between British America and the British West Indies, and Foreign America and the Foreign West Indies.

This trade is regulated and defined by the 3 Geo. 4. c. 44., the first of the two new acts which now constitute the law of our colonial trade. Under this act, the first rule of this branch of our trade is, that all the several ports and places, hereunder mentioned, shall be considered and regarded as free ports for the trade and commerce between the British and Foreign West Indies, and British and Foreign America, so far as allowed by this act. These

Free ports.

ports and places are the following :—In Jamaica, Kingston, Savannah le Mer, Montego Bay, St. Lucia, Antonio, St. Ann, Falmouth, Maria, and Morant Bay. In Grenada, St. George. In Dominica, Roseau. In Antigua, St. John's. In Trinidad, St. Joseph. In Tobago, Scarborough. In Tortola, Road Harbour. In New Providence, Nassau. In Crooked Island, Pitts Town. In St. Vincent, Kingston. In Bermuda, Port St. George, and Port Hamilton. In the Bahamas, any port where there is a custom-house. In Barbadoes, Bridgetown. In New Brunswick, St. John's and St. Andrew's. In Nova Scotia, Halifax. In Canada, Quebec. In Newfoundland, St. John's. In Demarara, George Town. In Berbice, New Amsterdam. In St. Lucia, Castrees. In St. Kitt's, Basseterre. In Nevis, Charles Town. In Montserrat, Plymouth.

The second rule of this branch of our trade (between the British and Foreign West Indies and America,) is, that all the several articles and commodities hereunder mentioned shall be considered and regarded as "*enumerated articles*" for *importation*; that is to say, that whenever the term *enumerated* is employed in the act or acts regulating the importation trade between the British and Foreign West Indies and America, such term shall be understood with reference to the act hereunto appended: *viz.*

Enumerated articles.

Asses, barley, beans, biscuit, bread, beaver and all sorts of fur, bowsprits, calavances, cocoa, and cattle, cochineal, coin and bullion, cotton wool; drugs of all sorts; diamonds, and all precious stones; flax, fruit, and all vegetables; fustic, and all dyers' woods; flour, grain, garden seed, hay, hemp, heading-boards, horses, hogs, hides, and hoops, hard wood or mill timber, Indian corn, indigo, live stock, lumber, logwood, mahogany, masts, mules, neat cattle, oats, peas, potatoes, poultry, pitch, rye, rice, staves, skins, shingles, sheep, tar, tallow, tobacco, turpentine, timber, tortoise shell, wool, wheat, and yards.

Importation.

The third rule is, that all the above *enumerated* goods may be *imported* into any of the above enumerated ports (mentioned in rule the first) from any foreign country on the continent of North or South America, or from any foreign island in the West Indies, whether such country or island shall be under the dominion of any foreign European sovereign or otherwise; such import to be made either in British built vessels owned and navigated according to law, or in any vessel of the built and ownership of the place of growth, produce, or manufacture, whether of the mother country, or a foreign colony under its dominion; or in any British vessel which has been sold to and become the property of such importing country, or its subjects.

Exportation.

The fourth rule is, that it shall be lawful to *export* from all the ports above enumerated, and in all the descriptions of vessels above mentioned, (that is to say, in British built vessels lawfully owned

and navigated, in foreign vessels of the place of growth or manufacture, or in British built vessels sold or exchanged to foreigners) all articles whatever of the growth or manufacture of any of his majesty's dominions; and all other articles, which may have been legally imported into any of the said ports; provided such article (where exported in any foreign ship) shall be exported *direct* to the country or state in America, or the West Indies, to which such vessel belongs. Exportation.

The fifth rule is, that arms and naval stores cannot be so exported, unless a previous licence shall have been obtained from the secretary of state; and in case any such articles shall be shipped or water borne for the purpose of such illegal exportation, the same shall be forfeited.

The sixth rule is, that all the enumerated articles (the articles enumerated in rule second) which shall have been legally imported into any of the enumerated ports may be re-exported from one British West Indian or American colony to another, in any British vessels owned and navigated according to law, or may be so exported to any part of the United Kingdom in Europe, under the rules of the 12 Car. 2., subject only to the restrictions of the act of 20 Geo. 3., intituled "An act to prevent the planting tobacco in England."

The seventh and last rule of this branch of our colonial trade is, that all the above privileges of an importation (nearly free,) and of an exportation or fetching from our islands (completely so,) is confined to the vessels of such countries only as give the like privileges to British vessels in their ports in America or the West Indies, and therefore may be revoked by his majesty by an order of council, when it shall appear that the like privileges are discontinued by any such foreign state or sovereign.

X. The above, therefore, being the rules of the first branch of our colonial trade, that is, of the trade between British America and the British West Indies, and Foreign America and the Foreign West Indies, we proceed, secondly, to the rules of the second branch of this trade, namely, to the trade between British America and the British West Indies, and other parts of the world.

XI. This trade is regulated by stat. 3 Geo. 4. c. 45., by an examination and condensation of which act, the existing rule of this branch of our colonial system may be collected and exhibited as follows:—The rule is, that it is lawful to *export* from any of his majesty's colonies or islands in America or in the West Indies, in any British built vessel owned and navigated according to law, any articles the growth, produce, or manufacture, of any

Colonial trade with Europe and all parts of the world.

Colonial trade
with Europe
and all parts of
the world.

such colony, and any articles which have been legally imported into such colony, *direct* to any foreign port in Europe, or in Africa, or to Gibraltar, Malta, or its dependencies, or to Guernsey, Jersey, Alderney, or Sark. It is lawful to *import* into the colonies, in any *British vessel* owned and navigated according to law, from any *foreign* port in Europe or Africa, or from Gibraltar, Malta, Guernsey, Jersey, Alderney, or Sark, all or any of the articles hereunder enumerated. (a)

Under our treaty of commerce with America, and the acts of parliament which have been passed to give it effect, nearly all the rules, (applicable to the trade of Foreign America, and the British West Indies,) were practically established, and were acted upon, in the trade between our colonies and islands, and the United States of America. By this treaty, and the confirmatory acts, it is further provided that America shall enjoy a colonial trade and communication with our East Indian settlements; that her vessels shall be freely admitted, and hospitably received, in the principal ports of the East Indies, and that the citizens of the United States shall freely carry on trade between America and the British East Indies. It is expressly however provided, that the vessels of the United States shall not carry any of the commodities of the British East Indies, except to some port of the United States, where they are to be unladen. It is provided by the same convention, and the statutes passed to give it effect, that the vessels of the United States shall not carry on any coasting trade along the shore of the British territories in the East Indies, nor from island to island; though they may touch for refreshment, but not for commerce, at the Cape of Good Hope, the island of St. Helena, or at any place in possession of Great Britain in the African or Indian sea.

It will be scarcely necessary to repeat that the trade, as regulated by the above treaty, and the confirmatory acts, can only be carried on in ships built in the countries of the United States, and whereof the master, and three-fourths of the mariners, are

(a) These articles are as follow.—
Anchovies, argol, alabaster, aniseed, amber, almonds, biscuit, brandy, bullion, brimstone, boxwood, beans, botargo, cattle, currants, capers, cantarides, corn, cummin seed, coral, cork, cinnabar, cascassoo, caviar, dates, essences, emery stone, flour, fruits, figs, garden seeds, gums, grain, honey, jalap, incense, juniper berries, Malta stone, lentiles, lumber, manna, mosaic work, medals, meal, musk, marble,

mill timber, macaroni, mules, nuts, oil of olives, almonds, opium, orris root, ostrich feathers, ochres, orange buds, olives pickled, paintings, prints, pozzolana, precious stones, pearls, punch, pumice stones, peas, parmesan cheese, quicksilver, raisins, rhubarb, rice, salt, sausages, senna, scammony, sarsaparilla, saffron, safflower, shingles, sponges, staves, sheep, vermilion, vermicelli, whetstones, wine, wood, hoops,

American subjects. The goods imported must likewise be of the growth, produce, or manufacture, of the United States.

XII. It has been before stated that the two acts, which now regulate the two divisions of our colonial trade, namely, the trade between our West Indies and America, and the Foreign West Indies and America, and the trade between our West Indies and America with Europe and other parts of the globe, are the 3 Geo. 4. c. 44., and the 3 Geo. 4. c. 45., and that all the existing rules and regulations of the trade are comprehended in these statutes. But as confusion often arises in practice under some doubts as to the repealed statutes, it may not be without use to collect under one head the titles of these statutes. The reader will find them in the subjoined note. (a)

The Cape of Good Hope having been conquered by his Majesty in the late war, was not treated as a permanent acquisition, but was placed under the special government of the king; and his Majesty was empowered by several acts of parliament to make regulations touching the trade and commerce of that settlement; 49 Geo. III. c. 17. By the first article in the treaty with the king of the Netherlands, this important colony is ceded to the crown of Great Britain, Aug. 13, 1814. By the 54 Geo. III. c. 77., the shipping of wine, the produce of that settlement, is specially regulated. And by order in council, since confirmed by law, dated 24th of September, 1814, it is ordered that it shall be lawful, until further order, for all vessels belonging to the subjects of any country or state in amity with his Majesty, to enter into the ports of the settlement of the Cape of Good Hope, and of the territories and dependencies, for the convenience of repairs and refreshment only, in which case a part of the cargoes of such vessels may be permitted to be disposed of, for the purpose of defraying the ex-

Ceded colonies.

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| <p>(a) 1. Statutes repealed by the 3 Geo. 4. c. 44., by which the first division of the colonial trade is now regulated: 28 Geo. 3. c. 6. 28 Geo. 3. c. 32. 29 Geo. 3. c. 16. 29 Geo. 3. c. 56. 30 Geo. 3. c. 8. 31 Geo. 3. c. 38. 33 Geo. 3. c. 50. 44 Geo. 3. c. 101. 45 Geo. 3. c. 57. 46 Geo. 3. c. 72. 48 Geo. 3. c. 125. 49 Geo. 3. c. 22. 52 Geo. 3. c. 79. 52 Geo. 3. c. 99. 53 Geo. 3. c. 37. 53 Geo. 3. c. 50. 54 Geo. 3. c. 48. 57 Geo. 3. c. 28. 57 Geo. 3. c. 74. 58 Geo. 3. c. 19. 58 Geo. 3. c. 27. 59 Geo. 3. c. 18. 59 Geo. 3. c. 55. 1 Geo. 4.</p> | <p>c. 12. 1 Geo. 4. c. 32. 1 & 2 Geo. 4. c. 7.
2. Statutes repealed by the 3 Geo. 4. c. 45. by which the second division of the colonial trade is now regulated: 25 C. 2. c. 7., so far as relates to duties on exportation of sugar, tobacco, &c. from British America and British West Indies by Europe; 51 Geo. 3. c. 97. 52 Geo. 3. c. 98. 55 Geo. 3. c. 29., so far as it relates to the trade between Malta and the British colonies; 57 Geo. 3. c. 4. 57 Geo. 3. c. 89.</p> |
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Ceded colonies.

penses of such repairs or refreshment; and that it shall also be lawful for any vessels belonging to the subjects of any country or state in amity with his Majesty, to import into the ports of the Cape of Good Hope, and of the territories and dependencies, any articles of provisions, with the permission of the governor of the Cape of Good Hope first obtained, by licence, in writing under his signature, which licence he is hereby empowered to grant. And it is further ordered that goods the growth, produce, or manufacture, of the countries to the eastward of the Cape of Good Hope, legally imported into the said settlement, or into the territories or dependencies thereof, may be exported from the said settlement, &c. to the ports of the United Kingdom, subject to the regulations in 53 Geo. 3. c. 155., or to any places to which a trade in such articles is permitted to be carried on, from the said settlement, &c. under the provisions of 54 Geo. III. c. 34., and subject to the regulations in the said act, in British vessels, or in such vessels that shall have been built within the territories belonging to the East India Company, or in the ports under the immediate protection of the British flag in the East Indies.—And that it shall in like manner be lawful to export from the said settlement of the Cape of Good Hope, or its territories or dependencies, in British vessels, or in such vessels that shall have been built within the territories belonging to the East India Company, or in the ports under the immediate protection of the British flag in the East Indies, to any places to which trade may be lawfully carried on from the said settlement, or its territories or dependencies, any articles of British or European produce, or manufacture, which shall have been legally imported into the said settlement, &c.; provided, however, that nothing in this order shall extend to permit a trade in tea, between the Cape of Good Hope, or its territories, or dependencies, and the countries to the eastward thereof, or from the said settlement, &c. to the ports of the United Kingdom; nor to permit any vessel under the burthen of 350 tons (a) to export from the said settlement, &c. to the ports of the United Kingdom, any articles the growth, produce, or manufacture, of any countries situated within the limits of the East India Company's charter; and that the trade and commerce to and from the said settlement, &c. shall be subject to such of the laws of trade and navigation, and the regulations thereof, as would have affected the same, if this order had not been made, except as far as such laws are contrary to this present order.

(a) Repealed by the East India Free Trade Consolidation Act, 4 Geo. 4. c. 80. *post.*—See likewise other sections of that act as to this trade.

The acts referred to in this order of council, repewed and qualified as occasion has required, preserve the rights of the East India Company, in favour of whose exclusive commerce it is provided, that the Cape of Good Hope should be construed to be within the limits of their charter, 57 Geo. 3. c. 95. Ceded colonies.

As it is necessary in a work professedly treating of the whole of any subject, to comprehend all the public acts of the legislature relating to such subject, we have been compelled, in the preceding pages, to be more full and minute than may suit the occasion of persons referring to them for instruction on a particular point. The learned reader will understand the necessity, and the practical reader the utility, of this detail.

XIII. Such is the system of the colonial trade, founded upon acts of parliament sweeping and prohibitory in the first instance, but which have gradually been relaxed by the changed condition of the times, the necessities of commerce, the equitable claims of the colonists, and the reasonable rights of foreign and independent nations. In every departure from the colonial system which we have had occasion to mark in the preceding pages, it may be observed, that where the legislature have been compelled by the necessities of the times to make a deviation from a former rule, they have still retained such rule, and the principle upon which it was built, constantly within their view: and they have, in most cases, so qualified and restricted the exception which they have been compelled to admit, as to restrain the liberty conceded within the exact limits of the necessity of the case. They have regarded our colonies as one of the principal means of maintaining and augmenting our navy and shipping; and, with this purpose, they endeavoured, so long as it was possible, to retain both the import and exports to ourselves, and in our own ships. When they were compelled to depart from this monopoly, (for such it was) such departure has only been gradual, and never with the total sacrifice of the original principles. Thus, if foreign American or West Indian ships have been allowed to import articles of the growth and production of American colonies, under the dominion of any foreign European state, it was a concession only to prevent illicit trade; and it is prevented from breaking in too much upon our navigation system, by requiring that all such ships should be the ships of the country from which the goods are so imported, navigated by its subjects or inhabitants; and that the commodities should be of the growth and production of the country from which they are sent: this is a restriction intended to prevent the carrying trade. And, as it would be a hardship upon such merchants Colonial trade.

Colonial trade. and an intolerable impediment to commerce, if, after being allowed to import such articles, they were compelled to return in ballast, such vessels are permitted to export the produce of the colonies, but they must export them direct to the country or state in America or the West Indies, to which such vessel belongs.

Again, as the colonies want a continual supply of lumber, provisions, live-stock, &c. which can only be procured cheaply from the United States, it has been deemed prudent to depart from the former rigid rule; and under the necessity of the case to allow this importation, but still under the restriction that it shall be direct. The late acts indeed have given to the United States an important privilege, from which the colonial policy of former times excluded them. American built vessels, lawfully navigated, may now import certain goods direct to the West Indies, and export colonial produce in their own bottoms.

Again, for the sake of admitting the merchants of our colonies into a participation in the general trade of the country, and for the sake of procuring a larger consumption of our own manufactures, the colonies are permitted to become a kind of *depot* for the supply of each other; as every colony is allowed to export to another, with some few exceptions, whatever may have been previously imported into it according to the laws. And the late Act, 3 Geo. 4. c. 45, by permitting the colonies to carry on a *direct* trade of import and export with Europe and Africa, has almost completed the system of colonial emancipation.

Under all the above circumstances, it is manifest that the ancient colonial system could not have been adopted and retained so long, and with the same effect, by any other country than Great Britain, whose capital, whose ships, and whose manufactures, have long existed in too great an extent to constitute her exclusive supply of such colonies, and such engrossing of their trade, an injurious monopoly. The colonial merchant and planter possessed as wide a market, and as numerous purchasers, as their stock required: their produce was never too large for the demand. The mother country therefore enjoyed the benefit of the system, whilst the colonies did not suffer. An eminent example of the mischief of a similar monopoly, under other circumstances, may be seen by the relations of Spain and South America. Spain, unable to purchase a large colonial produce, and admitting no one else to purchase, necessarily impeded the growth of her colonies, by confining their produce to the stock only which the mother country could take, and by purchasing that stock at the price of those who buy from those who are compelled to sell. The British empire, on the other

hand, either consuming all, or being enabled to sell it by an extended commerce to other nations, at once encouraged the colonies, and advanced its own general trade.

XIV. The trade with Asia, Africa, and America, not being colonial, is the next in order.

Trade with
Asia, Africa,
and America,
not being co-
lonial.

In the colonial trade our legislature anciently proposed to itself the two main objects; the exclusive possession of the market of its colonies, and the exclusive carriage and transport of their produce and supply in British shipping. In the trade with Asia, Africa, and America, not being colonial, the simple object was the encouragement of British shipping, and the abridgment or suppression of the Dutch carrying trade; and, that our navigation interests might have the full advantage of the large share of our merchants in this trade, the first attention of the legislature was directed to the two important provisions; first, that this branch of our trade should be carried on in English ships; and, secondly, that such voyages and such trade should be directly with those countries.

Upon the principle of necessity however thrown silk, jesuits bark, sarsaparilla, balsam of Peru, raw silk, mohair, cochineal, &c. were very early excepted from the rigid rules of the Navigation Act, and several statutes were passed to allow of other exceptions. All of these statutes are repealed by the 3 Geo. 4. c. 42., and the enactments of each, which it has been deemed proper to retain, embodied in one act, (the 3 Geo. 4. c. 43.) which now, therefore, constitutes the actual condition of this division of our general commerce.

XV. This statute (now the law of our commerce) commences 3 Geo. 4. c. 43. by a brief recital, that whereas the strength and safety of the kingdom depend greatly upon a due observance of the law established in the 12 Car. 2. c. 18., and whereas such act has been rendered complicated by the many other acts passed to extend, restrain, amend, or qualify it, it has become expedient "that such of the provisions contained therein as relate to *the countries from whence, and the ships in which*, goods and merchandise shall be imported into the United Kingdom, should be revised and amended, and together with other regulations be re-enacted and declared, so that the said law might be simplified and rendered more certain."

XVI. The statute then proceeds to establish the following rules for regulating this branch of our trade. 1. All goods and merchandise, the growth or manufacture of Asia, Africa, or America, may be imported into the United Kingdom from any place what-

Trade with
Asia, Africa,
and America,
not being co-
lonial.

over in British built ships, registered and navigated according to law, and in British-built ships only, except as hereunder mentioned. **II.** Where such goods, being the growth or manufacture of Asia, Africa, and America, shall be imported into the United Kingdom, from any port in Europe, they shall be warehoused for *exportation only*, except in the cases hereunder mentioned. **III.** All goods, the growth of Spanish Independent America, may be imported either from the place of their growth, or from the usual shipping port, in vessels of the built of such place or port, owned and navigated according to law. **IV.** All goods, the growth of Spanish Royal America, may be imported in any Spanish ship owned and navigated according to law. **V.** But these privileges are not to extend to admit the importation into the United Kingdom of any such goods, except only from such countries where British vessels shall be entitled to equal privileges. **VI.** All goods, the growth, &c. of the dominions of the Grand Seigneur, may be imported into the United Kingdom in British-built vessels, owned and navigated according to law, or in vessels of the built of the place of growth, or in vessels of the built of the usual port of shipment. **VII.** Raw silk, and mohair yarn, of the growth of Asia, or Turkey in Europe, may be exported to the United Kingdom from any ports or places in the Levant seas, within the Turkish dominions, or from Malta or Gibraltar. And all goods, the growth, &c. of the dominions of the Emperor of Morocco, which shall have been imported legally and directly into Gibraltar, may be imported thence into the United Kingdom in British-built vessels only, owned and navigated according to law. **VIII.** Malta and its dependencies shall be deemed to be in Europe. **IX.** The 3 Geo. 4. c. 48. is not to be construed as affecting the American trade acts and treaty. The Portuguese trade acts. The East India Company's rights under their charter, or under the 53 Geo. 3. c. 155., or 57 Geo. 3. c. 36. The Cape of Good Hope acts; *viz.* 49 Geo. 3. c. 17., and 57 Geo. 3. c. 1, 5. The acts passed to protect the British cod and herring fishery; *viz.* 15 Car. 2. c. 7. s. 16. 18 Car. 2. c. 2. s. 2. 10 & 11 Will. 3. c. 24. s. 13, 14., and 1 Geo. 1. stat. 2. c. 18. s. 1, 2.

Such are the rules which now regulate this division of our trade.

XVII. As the institution of the great chartered companies, the East India Company and others, falls under this division of our subject, it is now necessary briefly to consider them.

The first of these companies in commercial and political importance is the East India Company. By a course of things which could not have been foreseen at the time of the company's first in-

East India
Company.

stitution, it has become one of the most extraordinary corporate bodies in Europe; having gradually ascended from the character of a mere mercantile factory to that of a sovereign administrator of one of the most extensive and populous empires in the world. Having conquered the neighbouring powers, in a great part, by its own resources, and almost entirely at its own expense, the company has acquired many of the territories, and the property of the revenues of the native princes; and thus, in addition to its mercantile character, it unites that of an empire in an empire, and effectually compels the mother country to acknowledge it in its double character, that of a commercial factory, and, as it were, a dependent and tributary government, responsible to the sovereign and state, so far as respects control; but having a property, as it were, and dominion, in the territories under its charter.

East India
Company.

Queen Elizabeth, by charter in 1600, established the first incorporated company for this trade. They afterwards acquired the name of the East India Company, or "*united Company of merchants of England trading to the East Indies.*" By the 9 and 10 Will. 3. c. 4. a new company was formed, whose rights were more explicitly defined, and the limits of their monopoly more accurately adjusted. They are empowered freely to traffic, and use the trade of merchandise, in such places, and by such ways and passages, as are already frequented, found out, and discovered, or which shall hereafter be found out or discovered, and as they shall esteem and take to be fittest and best for them, "into and from the East Indies, in the countries and parts of Asia and Africa, and into and from the islands, ports, havens, cities, creeks, towns, and places, of Asia, Africa, and America, or any of them, beyond the Cape of Good Hope to the Straights of Magellan, where any trade or traffic of merchandise is or may be used or had; and to and from every of them." By section 81 this trade is confined solely to the East India Company; and others trading in violation of their exclusive rights are to incur the forfeiture of their vessels and goods. This act reserved a power for determining their charter after September 1711, on giving due notice, and on payment of the loan which the public owed the company. The old East India Company, established by Queen Elizabeth, and the new company incorporated by the statute of Will. III., afterwards formed an union, which was confirmed by 6 Ann. c. 17. In 1708 the company obtained an extension of their term in the exclusive trade for fifteen years: this was a purchase, and the consideration was a loan to the government. By the stat. of 10 Ann. c. 27., all the provisoes and powers of former acts of

East India
Company.

parliament for determining their trade and corporation were repealed; and a power was reserved to the public to redeem the debt due to the company at any time after September, 1733. The stat. of 3 Geo. 2. c. 14. continued to them their exclusive trade till 1766, for which they gave to the public a premium of 200,000*l*. By 17 Geo. 2. c. 17. they obtained a further term of fourteen years, for which they made a loan to the government of one million at three per cent. The next stat. is the 21 Geo. 3. c. 65. which granted to the company, for a further term, a sole and exclusive trade to the East Indies. This act provided, that all vessels belonging to the company, whether built or purchased by them, should be deemed British ships within the meaning of the Navigation Act. The term granted by this act was determinable in 1794. The 24 Geo. 2. c. 25., and 33 Geo. 3. c. 52. are the next in order. By these acts, which effected an important change in the constitution of the company, and brought it immediately under the supervision and controul of parliament, the territorial acquisitions, with their revenues, are continued in the company; but his Majesty is empowered to appoint commissioners for the affairs of India, who are invested with authority to superintend, direct, and control all acts, operations, and concerns, which relate to the civil and military government of India. The several functions of the board of control are declared and marked out. The government of presidencies is vested in the governor-general and the counsel of the presidency; and all vacancies in the office of the governors or council are to be filled up by the directors. The powers of these officers in their several departments are defined: and an authority is reserved to the Court of directors to suspend the powers of the governor-general, with the approbation of the board of commissioners. An exclusive trade is then vested in the company, according to the limits mentioned in the act of 9 and 10 Will. 3., with the proviso "that at any time, upon three years' notice to be given by parliament, after the 1st of March, 1811, upon the expiration of the said three years, and upon payment made to the company of any sum or sums, which, under the provisions of any acts of this present session of parliament, shall, or may, upon the expiration of the said three years, become payable to the said company by the public, according to the true intent and meaning of such act, then and from thenceforth, and not before or sooner, the said right, title, and interest, of the said company, to the whole, sole, and exclusive trade to the East Indies, and parts aforesaid, shall cease and determine." It is pro-

vided. however, by this act, (33 Geo. 3. c. 52.) that the sailing of ships upon the southern whale fishery, under the provisions of 26 Geo. 3. c. 50., and 28 Geo. 3. c. 20., into the Pacific ocean, by Cape Horn, should not be deemed an infraction of the privileges of the company. This act further provides that, during the exclusive trade of the company, it shall be lawful for British subjects, resident in the king's dominion, to export, on board the ships of the company, goods, wares, and merchandise, of the growth, produce, and manufacture, of these dominions, to any of the ports and places in the East Indies, usually visited by their ships; and that, in like manner, it shall be lawful for any of his Majesty's subjects in the civil service in India, to consign on board the ships of the Company, or in vessels freighted by them, bound to Great Britain, such goods, wares, and merchandise, as may be lawfully imported. None but the company, or persons acting under their licence, are to be suffered to export or import military stores, pitch, tar, or copper, or to import into Great Britain India calicoes, dimities, muslins, or piece goods. It is further provided that, in case the company shall not purchase every year 1,500 tons of British copper, for the purpose of exportation to some place within the limits of their charter, the proprietors or holders of British copper, resident in this country, may export that quantity, in ships to be provided by the company, to any port or place they think proper in the East Indies. The act further regulates the manner of its exportation, and the charge of freight. And, provided a sufficient quantity of calicoes, &c. are not imported by the company for the consumption of the British market, the board of controul are authorised to license individuals to import such goods in the company's ships, under such limitations and restrictions as the board shall think necessary. The act then proceeds to several regulations for the benefit of individuals engaged in the private trade.

In order to prevent unlawful trading, it is then enacted that, if any of his Majesty's subjects of Great Britain, &c. or of the colonies, islands, or plantations in America, or the West Indies, other than such as by the said united company shall be licensed, or otherwise thereunto lawfully authorised, shall, at any time or times, before such determination of the company's whole and sole trade, as is hereinbefore limited, directly or indirectly, sail to, visit, haunt, frequent, trade, traffic, and adventure to, in, or from the said East Indies, or other parts hereinbefore mentioned, contrary to the limitations, &c. of this act, they shall incur the forfeiture of ship or vessel, &c. and also all the goods and merchandise laden

East India
Company.

East India
Company.

thereupon, and all the proceeds and effects of such goods and merchandise, and double the value thereof; one-fourth part of such forfeiture to the person who shall seize and inform, and sue for the same; the other three-fourth parts to the use of the united company, they defraying the charge of the prosecution. Persons going to India, without the licence of the company, are to be deemed unlawful traders, and may be arrested and sent back to England.

Free trade
established by
53 G. 3. c. 155.

Upon these statutes, the 24 Geo. 3., and 33 Geo. 3., the rights of the company subsisted until the 53 Geo. 3. c. 155., which is the next and most important act. This act has partially repealed the monopoly of the company, and thrown open to the British merchant the trade of the East. This act continues under the government of the company, for a further term, the territorial acquisitions in India, with the late acquisitions on the continent of Asia, and in the islands north of the Equator: it confirms to them the sole and exclusive trading with China, and the sole and exclusive right of trading and trafficking in *TEA*, "in, to, and from, all islands, ports, havens, coasts, cities, towns, and places, between the Cape of Good Hope and the Straights of Magellan." But this, as well as all other exclusive trade, is to cease on the expiration of three years' notice by parliament, any time after the 10th of April 1831, and upon the discharge of the public debt owing to the company. There is, however, the same saving clause as in the statute of 9 and 10 Will. 3., and 33 Geo. 3. by which, after such determination of their charter, the company is still to continue incorporated, and to enjoy the right of trading in common with others. It then provides that, after April 1814, any of his Majesty's subjects may trade to and from the United Kingdom; and from and to ports and places in the company's present limits, except China, in ships navigated according to law. But the company are alone permitted to export military stores to certain places.

By this act, all ships engaged in the private trade were ordered to clear out from some port in the United Kingdom; and all goods imported in private vessels to be brought to some port in the United Kingdom, which shall have been declared fit and proper for the deposit of their goods and merchandise by order of council. (a) Such ships were directed, by this act, not to go within certain

(a) By orders of council of the following dates, the ports under-mentioned have been declared fit and proper for such trade, Liverpool, December 1814; Hull, February 1815; Greenock and Port Glasgow, March 1815; Bristol, August 1817.

limits in India, without licence from the directors; nor to any places except to some one of the principal settlements, *viz.* Fort William, Fort St. George, Bombay, and Prince of Wales's Island, without a special licence. The directors were, however, required to give licence to the private vessels to enter the principal settlements in India: but special licences were required for the continent of Asia, between the Indus and the town of Malacca, or the islands north of the Equator, or Bencoolen. These licences were left to the discretion of the directors, subject to the controul of the board of commissioners, who, if they think fit to direct the company to issue any licences for this trade, which the court of directors have declined to issue without such direction, are to record their reasons, and the special circumstances of the case. It was provided, moreover, by this act, that no ship under three hundred and fifty tons should clear out, or be permitted to trade, within the limits of the company's charter.

East India
Free Trade.

The acts for permitting and regulating the free trade to the East India, subsequent to the 53 Geo. 3. c. 155. having become too numerous and complicate, it was judged necessary in this branch of commerce, as in the system of the navigation laws in general, to consult the convenience of merchants, and to consolidate, enlarge, amend, and re-enact their principal provisions. The 4 Geo. 4. c. 80. was passed for this purpose. This act repeals the 53 Geo. 3. c. 92. the 54 Geo. 3. c. 34. 55 Geo. 3. c. 116. 57 Geo. 3. c. 36. 1 & 2 Geo. 4. c. 65. and so much of 53 Geo. 3. c. 155. as authorises the carrying on trade within the limits of the company's charter. It first enacts that a free trade may be carried on in British vessels with all places, except China, within the East India Company's charter, and that the company may carry on all such trade which his Majesty's other subjects may carry on. But, the act does not permit any trade without the limits of the company's charter, which cannot now be legally carried on. Military stores are not to be carried without a special licence; and no vessels are to proceed to any port between the Indus and Malacca, until admitted to entry at one of the principal settlements in India. If the court of directors should not comply with applications for leave to go to minor ports, the same are directed to be referred to the commissioners for the affairs of India. Additional ports or places between the Indus and town of Malacca, &c. are to be considered as principal settlements of the company for this act. But this act does not permit any trade with *China*, or *in tea*. The goods, conveyed by this trade, are only to be imported into ports having warehouses or docks; and ships engaged in the Southern Whale Fisheries are

Consolidation
of the East
India free
trade acts.
4 G. 4. c. 80.

East India
Company.

to be subject to the restrictions of this act only. Goods imported into Malta or Gibraltar may be re-exported. This act does not affect the powers vested in his Majesty, with regard to the Cape of Good Hope and the Mauritius. 1 Geo. 4. c. 11. Nor does it affect certain acts, 54 Geo. 3. c. 36. 54 Geo. 3. c. 103. 55 Geo. 3. c. 10. 59 Geo. 3. c. 33. 59 Geo. 3. c. 52. 1 & 2 Geo. 4. c. 106. Nor does it repeal certain provisions of 53 Geo. 3. c. 155. as to the resort of persons to India; nor affect the legislative provisions for preventing clandestine trade, 33 Geo. 3. c. 52. 53 Geo. 3. c. 155.

Such are the general rules for regulating the private trade with the East Indies. This trade is no longer confined to ships of a certain tonnage, as by the 53 Geo. 3. c. 155. but is now permitted to be carried on in a more large and liberal manner than under that act.

In order that the forms of the registry acts may be observed in the East Indies, the 55 Geo. 3. c. 116. empowers a collector of duties, or senior merchant, of six years' standing, in ports in which there is no collector or comptroller of customs, to register and grant certificates of the registry, of all vessels built in the territories under the government of the East India company; and all such vessels, when so registered, are to be deemed British *built*. But no vessel, registered under the authority of the act, is entitled to the privileges of a British *built* ship, in any voyages or trade beyond the limits of the company's charter; except such as are specified in the 53 Geo. 3. c. 155., and 54 Geo. 3. c. 34.

It is further provided that no Asiatic sailors, Lascars, &c. shall be deemed to be British sailors, seamen, or mariners, within the intent and meaning of the act of the 34 Geo. 3. But, in case British seamen cannot be procured in the East Indies, the governor of any colony, island, or territory, may license a vessel to sail with a less proportion of British seamen than is required by law: but such vessel, upon her voyage back from the United Kingdom, must have the full and proper proportion of seven British seamen to every hundred tons; but vessels trading within the limits of the company's charter, including the Cape of Good Hope, may be manned and navigated wholly, or in any proportion, with Asiatic sailors, or Lascars. (a)

It has been generally understood that certain provisions of the navigation acts did not apply to the East Indies: some doubts however existing, the 57 Geo. 3. c. 95. was passed, which declares,

(a) But see 4 Geo. 4. c. 80. sections 30, 31, 32. as to Lascars and natives of India, who are not to be deemed mariners within the meaning of 34 G. 3. c. 68.

that nothing contained in the navigation acts, or in any other act, passed for the like purposes, shall extend to, or in any way affect, the importation or exportation of any goods by the East India company, or by any other of his Majesty's subjects, in British registered vessels, navigated according to law; or in vessels registered and trading under the provisions of 55 Geo. 3. c. 116. It is likewise made lawful to import into any island or territory, within the limits of the company's charter, not being under their government, in the vessels of any state, not being an European state, in amity with England, and lying within the said limits, any articles of the growth, produce, and manufacture of any such state; and to export from thence, in any such vessel, goods which have been legally imported.

East India
Company.

Such are the commercial privileges of the East India company, which, since the opening of their trade by the 53 Geo. 3., has assumed a different character.

Their temporary rights are—1. The exclusive trade to China, and the trade in tea; with such authority of regulations as respect the free trade to India as are given them by the late act.—2. The administration of the government and revenues of their territories in India, subject however to the controul of commissioners, appointed by the executive authority at home. Their rights in perpetuity are, to be a body politic and corporate, with perpetual succession, and a joint stock for *ever*; notwithstanding their exclusive trade may be determined by parliament.

Although their commercial privileges and power of administering the resources and government of India should be determined by the legislature, they would, nevertheless, still remain an incorporated company in perpetuity, with the exclusive property of Calcutta, Fort William, Madras, and Fort St. George, Bombay, Bencoolen, and other smaller settlements in India, as factories acquired or purchased by their own resources. The legislature, therefore, acting upon just principles, will be competent only to deprive them of all exclusive trade; and to take into its own hands, or into those of the crown, the government and collection of the revenue in India.

It is not within the limits of a work of this nature to enter into the political reasons for the several statutes of which it treats, any further than as the intention of the legislature is apparent on the face of the acts. It is sufficient, therefore, to observe of the board of controul, first established by 24 Geo. 3. c. 25., that its main purpose was to maintain the sovereignty of the crown and parliament over a territory which had gradually enlarged itself from a factory

East India
Company.

into an Empire. The board of controul, therefore, may be said to possess these three principal functions:—1. That of connecting India with the government at home as an integral part of the general empire.—2. That of superintending the conduct of the company's servants, and repressing those wars of ambition, aggrandisement, or private gain, the frequent occurrence of which first attracted the attention of the legislature.—3. That of bringing home, and prosecuting in the English courts of law, such crimes and offences as affected the honour of the crown, and the interests of general equity and humanity.

What the 24 Geo. 3. had left incomplete, the 33 Geo. 3. c. 52. supplied: it enlarged and regulated the controul in Great Britain; it added new provisions with respect to patronage and promotion; it confirmed the general trade, but added special limitations; it defined the illicit and clandestine trade, and regulated some appropriations of the company's revenue; it established a method of suing for forfeitures and penalties and proceedings as to seizures; it enacted some regulations for the administration of general justice in India, and made some new provisions as to the directors of the company's, and their concerns in England. The 55 Geo. 3. c. 155., first opened the trade of India to the general merchant; and its provisions have been much enlarged and improved by the act of consolidation, 4 Geo. 4. c. 80. The company at present possess little more of their original monopoly than the China trade and tea trade. By 35 Geo. 3., (continued by the 42 Geo. 3. c. 20., during the continuance of the company's exclusive right of trade under the 33 Geo. 3. c. 52.) the importation of goods from India and China, and other parts within the limits of the company's trade, is allowed in ships, not of British *built*, or registered as such, having been taken up and employed in the East Indies on account of the company; and the same ships are allowed to export goods to the East Indies as British built ships.

As the public duties of the officers of the government and revenue in India might be impaired by their private interests, if allowed to engage in traffic, all governors and counsellors, collectors, supervisors, and others, employed in the revenue, are prohibited from trade, except for the company. The judges of the supreme court of judicature in Bengal are prohibited altogether from trade.

South Sea
Company.

XVIII. The South Sea Company was constituted and erected into a corporation by the 9 Ann. c. 21. The monopoly of this company, which was most sweeping and comprehensive, continued a century without much inconvenience to the general commerce of the country: but, during a period of the late war, when the

intercourse with South America was unexpectedly thrown open to Europe, the exclusive privileges which the company claimed occasioned a serious impediment to the trade of the general merchant. The South Sea Company had become, in fact, little more than a title, with no active use of the extensive privileges and rights which it claimed. It seemed absurd, therefore, to continue an obstacle of this kind to the increasing trade of Great Britain; and to respect the charter of a company which had abandoned most of the purposes and conditions upon which it had been granted.

On account, indeed, of certain frauds and abuses (*a*) which had been practised relating to the capital stock, or pretended capital stock of this company, their property had been taken out of their hands, and vested in trustees for the satisfaction of their creditors: but their corporate character still existed. A considerable trade was carried on by interlopers within the limits of their charter, and no very serious obstacle was opposed by the company to this infringement of their rights. Their charter and their privileges were considered nearly as obsolete: but when the question was raised as to the lawfulness of this traffic, the courts of law had no difficulty in deciding, (the question being discussed upon an action on a policy of insurance,) that a vessel could not trade within the limits of the South Sea charter, unless expressly licensed by the Company. (*b*) At length the 47 Geo. 3. c. 23. repealed so much of the act of 9 Anne, as vested in the South Sea Company the exclusive trade, as far as respected places, which at the time of passing the act were, or thereafter might be, under the British dominion. For the encouragement of the southern whale fishery, the 42 Geo. 3. c. 77. had already repealed the necessity of a licence from the South Sea, or the East India Company, for ships passing through the Straights of Magellan, or round Cape Horn, and trading in the Pacific Ocean. And several acts of parliament had also passed for the benefit of the fisheries, which had gradually broken in upon and restricted the exclusive rights of this Company.—At length the 55 Geo. 3. c. 57. altogether abolished its commercial privileges. By this act the sole and exclusive privileges of trade and traffic, vested in the company by the 9 Anne, are declared to be *absolutely* repealed; “and shall be deemed and taken to have ceased and determined from and after the 12th of May 1815, to all intents, constructions, and purposes whatsoever.” In consideration of the surrender of such exclusive

South Sea
Company.

(*a*) *South Sea bubble.*

(*b*) *Toulmin v. Anderson*, 1 Taunt. 232.

South Sea
Company.

privileges, a guarantee fund was established in the public stocks; and it was provided by the above cited statute, that when such fund should amount to the capital stock of 610,464*l.* 3*s.* bearing an interest of 3 per cent. *per annum*, the same should be transferred to the South Sea Company as a full satisfaction for the surrender of their monopoly.

Hudson's Bay
Company.

XIX. In 1670 a charter of Charles 2. granted an exclusive trade to another part of America, to the governors and company of adventurers of England trading into Hudson's Bay. They were to have the sole trade and commerce of and to all the seas, bays, streights, creeks, lakes, rivers and sounds, in whatsoever latitude, that lie within the entrance of the streights commonly called Hudson's Streights, together with all the lands, countries, and territories, upon the coasts of such seas, bays, and streights, which were then possessed by any English subjects, or the subjects of any other Christian state, together with the fishing for all sorts of fish, of whales, sturgeon, and all other royal fish, together with the royalty of the sea. But this extensive charter has not received any parliamentary confirmation or sanction.

African Com-
pany.

XX. By a royal charter, made in the 24th year of the reign of Charles 2., a great portion of Africa was granted to certain persons by the name of the Royal African Company. This Company, since their establishment, had been put to great expense in rebuilding and enlarging several of their forts and castles on the coast, and otherwise maintaining their settlements. By the 23 Geo. 2. c. 31., which was an act for improving and extending the trade to Africa, a new company was established, by the name of the *Company of merchants trading to Africa*. The first section of this act grants a free trade to Africa to all his Majesty's subjects between the port of Sallee, in South Barbary, and the Cape of Good Hope. The forts, settlements, and factories, of the original Company were vested in the new Company by this statute: but they were prohibited to trade in their joint capacity; and their affairs were directed to be placed under the management of a committee, chosen annually, who were precluded from making any orders and regulations in restraint of a free trade with Africa. By 25 Geo. 2. c. 40. the Royal African Company was abolished, and all their forts and factories on the coast were vested in the Company of Merchants trading to Africa.

Sierra Leone
Company.

XXI. The Sierra Leone Company was incorporated by the 31 Geo. 3. c. 55. The object of their incorporation was with a view of establishing a general trade and commerce with Africa, and for exploring the interior of that continent. To assist them in

this purpose, his Majesty was empowered by act of parliament to make them a grant of the peninsula of Sierra Leone. After an experiment of sixteen years, the Company found it expedient to relinquish the government and management of this colony. They expressed a desire to surrender to the crown the settlement which had been granted them by letters patent, and supplicated that their charter of incorporation might cease and determine. Accordingly, the 47 Geo. 3. s. 2. c. 44. was passed, by which the letters patent were declared void, and the peninsula of Sierra Leone was re-vested absolutely in his Majesty. The Sierra Leone Company, therefore, has now altogether ceased.

Sierra Leone
Company.

XXII. By 42 Geo. 3. c. 20., the East India Company are allowed to import and export goods from and to India and China, in ships not British built, during the continuance of their charter; and by 53 Geo. 3. c. 155., by which act the trade of the East India Company was first opened to the British merchant, it is made lawful for his Majesty's subjects, in ships navigated according to law, to import into the United Kingdoms, from all places within the limits of the Company's charter, (except the dominions of the Emperor of China) any goods, the produce or manufacture of any country within the limits of the said Company's charter, except *tea*, although such goods *may not be of the growth, &c. of the place where they are shipped, &c.* (a) And by the 57 Geo. 3. c. 95. we have already shewn that the navigation acts do not extend to, or in any way affect the importation or exportation by the East India Company, or by any other of his Majesty's subjects, (in British registered vessels, &c. or trading under the provisions of 55 Geo. 3. c. 116.) of any goods, at, into, or from any place within the limits of the charter of the said Company; nor do they affect the importation or exportation at, into, or from any place whatsoever, in such vessels as aforesaid, of any goods, of the growth, &c. of any place within the limits aforesaid, or require that any bond for the exportation or importation of goods in any particular manner shall be given in respect of any such vessels, bound to or from any place within the limits aforesaid.

Relaxation of
the navigation
laws in the East
India trade.

During the continuance of the exclusive trade of the East India Company, and during the term for which the possession of the British territories in India is secured to the Company, it is made lawful for the vessels of countries and states in amity with his Majesty to import into and export from the British possessions in India such goods as they shall be permitted to import into, and export from, the said possessions, by the Directors of the Com-

(a) See likewise *ante*, 4 Geo. 4 c. 80., the East India free trade consolidation act.

pany; who are required to frame such regulations for carrying on this trade as may be most conducive to the interest and prosperity of the British possessions in India, and of the British Empire. It is not, however, lawful for the Directors to frame any regulations for the conduct of this trade, between India and the States in amity with the Crown of Great Britain, which shall be inconsistent with any treaty made or entered into by his Majesty, or which may be inconsistent with any act of Parliament passed for the regulation of the trade and commerce of the British territories in India. 37 Geo. 3. c. 117. and 4 Geo. 4. c. 80.

Relaxation of
the navigation
laws in the
trade with
Asia, Africa,
and America.

XXIII. In this view of our trade with Asia, Africa, and America, it will be seen that within the last thirty years it has undergone nearly as much alteration as our colonial trade itself. The principal feature of the new system has been, 1st, The permission to import goods of the growth or production of the United States, in ships belonging to the United States. 2d, A like permission to import goods of the growth and production of any of the Portuguese dominions and territories in Portuguese ships. 3d, A permission to import and export goods from and to India and China, in ships not British built, with other relaxations of the navigation laws as respects the East India trade, both with Great Britain and states in amity with her. 4th, The repealing of the act of Anne, (by which an exclusive trade was granted to the South Sea Company,) by 47 Geo. 3. c. 28., and 55 Geo. 3. c. 57. 5th, The abolition of the African slave trade. 6th, The opening of a great portion of the trade of the East India Company, and therein the relaxation of their monopoly. 7th, By the new system introduced under the registry acts, and the navigation consolidation act of 3 Geo. 4. c. 43. the principal provisions of which, as they affect the general trade with Asia, Africa, and America, have been before detailed.

It is now very generally understood that trading monopolies do not tend to the public benefit; and that the kingdom loses more by their effect upon general trade than the revenue gains by any remuneration which such companies can pay to the public stock. Hence, as far as may be consistent with public faith, it is not, perhaps, unreasonable to expect that the whole system of these monopolies will gradually disappear; and, as the capital and ships of this kingdom certainly exceed those of any company or joint stock corporation, so the general merchant will no longer be excluded from any portion of British trade by the absurd pretext that his credit and capital would be insufficient. In these observations, however, it is not intended to direct any reflections against the East India Company; a corporation which has always regulated their trade upon the liberal and enlarged principles of

British merchants; and, if they have long possessed a lucrative monopoly, have not employed it as a means of extortion against the public. But in an examination of our navigation laws, and of our general commercial system, we should deem ourselves to be wanting in just and national feelings, if we did not occasionally remark upon the character of the system, and congratulate the country upon the gradual efforts of the legislature to amend and enlarge it. So far as any restrictions are necessary to uphold and augment our naval power, and so far as what is gained by our navy exceeds in public interest what is lost by our commerce, so far, and so far only, ought the less interest to be sacrificed to the greater, and our commerce made to pay its tribute to our great engine of national defence. But when our naval interest is in no degree concerned, and the question rests solely upon commercial principles, it will certainly not admit a doubt, that the utmost possible liberty should be given to commerce; and that, in the advanced state of its elements in the British dominions, all reasons for monopoly, such, for example, as the collection of a sufficient capital by inviting merchants to make a joint fund, must have altogether ceased. Exclusive companies, therefore, however necessary in the early periods of our trade, have long ceased to bear any other character than that of impediments to our general commerce.

Relaxation of
the navigation
laws, &c.

XXIV. The next division of our subject is the European trade. This branch of our general commerce originally stood upon the navigation act of 12 Charles the Second, and particularly upon the eighth and ninth sections of that act, which, together with the useful and fundamental stipulations, that the built and ownership of the ship should be of the same country with the goods, contained likewise many prohibitory clauses, the mischievous nature of which became fully understood only as our commerce advanced to its present extent. Under this more enlarged comprehension of the true nature of commerce, and of political œconomy generally, the two acts of the 3 Geo. 4. c. 42., and the 3 Geo. 4. c. 43., were recently passed, and upon these two statutes reposes now the system of our European commerce.

Trade with
Europe.

The first of these acts, the 3 Geo. 4. c. 42. is a general repealing act, and is confined to the repeal of those numerous prohibitory acts, and parts of acts, which constituted the previous prohibitory system.

This statute having thus laid the ground work for a simplification of our navigation laws generally, the next act, the 3 Geo. 4. c. 43., takes up the subject as upon a clear basis, and proceeds

Trade with
Europe, &c.

with much brevity and method to enact and declare the following rules; which, taken collectively, constitute the law of our European trade.

XXV. All the following sorts of goods and merchandise, of the growth or production of any place in Europe, that is to say, masts, timber, boards, salt, pitch, tar, tallow, rosin, hemp, flax, currants, raisins, figs, prunes, olive oil, corn or grain, potashes, wine, sugar, vinegar, brandy, or tobacco, may be imported into the United Kingdom, either in British-built ships, registered and navigated according to law; or in vessels which by law are, or may be, entitled to the privileges of British-built vessels, registered and navigated according to law; or in vessels of the built of and belonging to the country in Europe of which such goods are the growth, produce, or manufacture; or in vessels of the built and ownership of the usual and only possible port of exportation for such goods, and all which foreign ships shall be wholly owned by the people of such country or place, and shall be navigated by a master and three-fourths, at least, of the mariners thereof, of such country. And such goods shall be brought in no other vessel whatsoever under the penalty of the forfeiture of all such goods, &c. 11. The above rule, containing a positive permission for the importation into the United Kingdom of the goods therein enumerated, is not to be construed to extend to prohibit the importation of any other goods or merchandise, which, though in such rule not mentioned, have heretofore been lawfully imported into Great Britain, from whatsoever place. 111. All goods, the growth of Turkey in Europe or Asia, may be imported either in Turkey vessels, that is, built and owned by the subjects of the Grand Seignior, or in British vessels duly built and registered. 1v. None of the above rules are to be so construed as to affect in any way the several acts relating to the American trade, (the trade between the United States and Great Britain,) the Portuguese trade, the privileges of the East India Company, the Cape of Good Hope acts, or the fishery acts. v. All goods, the growth or manufacture of any country or place in the West Indies, which actually is, or hitherto has been, part of the dominions of the King of Spain, and which goods might at any time be imported into the United Kingdom in British-built ships, may hereafter be imported either in such British-built ships, owned and navigated according to law, or in ships of the built of the country of the place of growth or manufacture, and coming directly from thence, or in ships of the built of the usual and only port for transportation. vi. All goods, the growth, &c. of such part of Spanish America, as continues, or may continue, under the

dominion of the King of Spain, or, if any doubt remains thereon, may be imported directly from such place of their growth or manufacture, either in any of the vessels mentioned in the preceding rule, or in vessels of the built of any country or place within the dominions of the King of Spain, duly manned and navigated according to law. **vii.** None of the above rules are to be extended so as to repeal such part of the act of 12 C. 2. c. 10., as relates to bullion, or to goods taken by way of reprisal. Nor to affect the colonial acts for regulating the importation from any British colony or island in America, or in the West Indies, the trade of which colonies is to stand and remain upon the several colonial acts specially passed for that purpose. Nor to repeal or alter the several acts relating to the importation of corn, usually termed the corn laws. Nor to repeal or alter the 47 Geo. 3. stat. 2. c. 27. respecting naval stores.

Trade with
Europe, &c.

XXVI. Such are the existing rules of our European trade, as now established upon the 3 Geo. 4. c. 43. By the fourth of these rules we perceive that the act contains an express provision that none of its enactments shall be so construed as to affect the several commercial treaties, or our actual trade with foreign powers under other statutes expressly passed to legalize such trade. If to the above rules, therefore, we now add a brief view of these treaties and of this trade, we shall complete our account of the European trade, as it now exists. In order to complete this view of our European trade, and the series of rules by which it is governed, it is necessary to add, that some of them have been slightly qualified by the effect of the commercial treaties which were concluded or renewed upon the termination of the war in 1814. Thus, by the existing commercial treaty between Russia and England, the commerce between Russia and England is to be deemed to be established upon the footing of the most favoured nations. The trade of Russia and Great Britain remains, indeed, still confined to the Russian company, or fellowship, established by the 10 and 11 Will. 3. c. 6. But as the sum of five pounds will entitle any British subject to the freedom of this fellowship, it can scarcely be deemed an impediment to general trade. By the 21 Geo. 3. c. 62., drugs of the production or manufacture of any part of the dominions of Russia, laden and shipped at any port under the sovereignty of Russia, may be imported in British *built* shipping into this kingdom, and shall be deemed to be imported *directly* from the place of their growth. By the treaty with Sweden (a) Sweden.

Russian trade.

Sweden.

Trade with
Europe, &c.

Denmark.

Netherlands.

France.

Spain.

the relations of friendship and commerce between Great Britain and that kingdom are re-established on the footing whereon they stood on the 1st of January, 1791; and all treaties and conventions subsisting between the two states at that epoch are to be regarded as renewed and confirmed by the late treaty. The trade with this country stands upon the common regulations of the navigation laws as applied to Europe. By the treaty with Denmark, (a) it is agreed between the contracting parties by the seventh article, that the commercial relations between the subjects of the respective countries shall again return to their ancient state, and the sovereigns reciprocally agree to adopt measures for giving them greater force and effect. The twelfth article of this treaty stipulates for the subjects of Great Britain the privilege of a *depot*, in the port of Stralsund, of all articles of the growth or manufacture of Great Britain or her colonies, on paying a duty of one *per cent. ad valorem*. And all the ancient treaties of peace and commerce are to be taken as renewed between Great Britain and Denmark, so far as they are not contradictory to the stipulations of the treaty of 1814. The treaty with the king of the Netherlands (b) contains no stipulation with regard to European commerce: but the fourth article guarantees to the subjects of the Netherlands the same facilities of commerce and security of persons and property within the British territories in India, which are granted to the most favoured nation. The like facilities, privileges, and protection, are guaranteed to the subjects of France by the twelfth article of the late treaty. (c) And by the convention made in the following year, the king of France engages to farm to the British government the exclusive right to purchase at a fair and equitable price salt on the coast of Coromandel and Orixá. But, with the exception of the articles relating to the slave trade, there are none which affect the present state of the trade between the two countries, or the interests of commerce in general. In the treaty with Spain (d) the following articles, though not exclusively referring to European trade, are deserving of notice. In the event of the commerce of the Spanish American possessions being opened to foreign nations, his Catholic Majesty promises that Great Britain shall trade with those possessions on the footing of the most favoured nation. And, pending the negotiation of a new treaty of commerce, it is stipulated that Great Britain shall be admitted to trade with Spain upon the same con-

(a) January 7, 1814.

(b) August, 1814.

(c) May, 1814.

(d) July, 1814.

ditions as those which existed previously to 1796 ; and all the treaties of commerce which subsisted at that period between the two nations are ratified and confirmed by the late treaty. (a) In the treaty with Portugal, (Feb. 1810,) it was deemed advisable, in favour of that country, to relax several important provisions of the navigation act. By the emigration of her sovereign to the Brazils, Portugal had formed a new seat of empire ; and ancient relations of friendship, no less than commercial prudence, suggested the propriety of admitting her to trade with Great Britain upon the footing of the most favoured nation. Accordingly, the 51 Geo. 3. c. 47., which was passed to carry into effect the treaty of commerce above referred to, repeals, in favour of Portugal, some important provisions of the navigation act. By the second section of this act, *any* goods of the growth, production, or manufacture, of *any* of the territories or dominions of the crown of Portugal, (*this* of course includes her American, as well as her European possessions,) are allowed to be imported direct from any such territories or dominions, in any ship or vessel built in any of the territories or dominions of the crown of Portugal. By the fourth section, elephants' teeth and ivory are allowed to be imported from any of the territories of Portugal in British or Portuguese ships, respectively, though such elephants' teeth or ivory may not be of the growth or production of any of the Portuguese dominions. By the sixth section, tobacco, pitch, tar, turpentine, hemp, flax, masts, yards, bowsprits, staves, heading boards, timber, shingles, lumber of any sort, and articles of provision and food, being of the growth and production of any of the territories and dominions of Portugal in South America, are allowed to be imported direct into any of the West India islands, notwithstanding the 28 Geo. 3. c. 6., and 31 Geo. 3. c. 38.

Trade with
Europe, &c.

Portugal.

The treaty with the King of Sardinia contains no article with respect to the European trade. But in the treaty of commerce and navigation between England and the King of the two Sicilies, (September 1816) there are some articles of importance. By the first article his Britannic Majesty consents, that all the privileges and exemptions which his subjects, their commerce and shipping, have enjoyed, in the dominions, ports, and domains of his Sicilian Majesty, in virtue of the treaty of peace and commerce concluded at Madrid, in 1667, between Great Britain and Spain ; of

Sicily and
Sardinia.

(a) By a decree of the king of Spain, of March 1818, Cadiz, Alicante, Corunna, and Santander, are established as ports of deposit for all goods permitted to be imported into Spain.

Trade with
Europe, &c.

the treaties of commerce between the same powers, signed at Utrecht in 1713, and at Madrid in 1715; and of the convention concluded at Utrecht, 1713, between Great Britain and Sicily, shall be abolished. By the fourth article, British commerce in general, and the British subjects who carry it on, are to be placed upon the same footing as the most favoured nation, not only with respect to the persons and property of British subjects, but also with regard to every species of article in which they may trade. (a)

Ionian Islands.

By the treaty between Great Britain and Russia, signed at Paris, (Nov. 1815) the islands of Corfu, Cephalonia, Zante, Maura, Ithaca, Cerigo, and Paxo, with their dependencies, are constituted a single, free, and independent state, under the denomination of the United States of the Ionian Islands. Their trading flag is to be acknowledged by all the contracting parties, as the flag of a free and independent state. The commerce between the United Ionian States and his Imperial and Royal Apostolic Majesty is to be placed upon the same footing as the commerce between Great Britain and these islands. (b)

Turkey.

There has been no treaty of commerce or navigation with Turkey; and this trade remains with the Turkey Company, of which we have already spoken. The places reserved to the Turkey Company, for their trade, are the States of the Republic of Venice, (in its Gulf) those of Ragusa, and all the Grand Seigneur's dominions; the ports of the Levant and Mediterranean, excepting those of Carthage, Alicant, Denia, Valencia, Barcelona, Marseilles, Toulon, Genoa, Leghorn, Civita Vecchia, Palermo, Messina, Malta, Majorca, Minorca, Corsica, and all other ports and places of commerce on the coasts of France, Spain, and Italy; and the fine for those interloping in the trade, and not members of the Company, is a fine of twenty *per cent.* on the value of the cargo.

Such is the European trade as it at present exists under the navigation laws, and the most recent treaties.

The coasting
trade.

XXVII. The next branch of our navigation laws is the coasting trade, in which our navigation system is still more exclusive than even with respect to the colonies themselves.

The laws of our coasting trade are as simple and absolute as their object is distinct and decided. They are chiefly contained in the 6th Sect. of the 12 Car. 2. c. 18., the 1 James 2. c. 18., the

(a) This treaty contains some clauses with respect to the reduction of duties, which are not within the scope of this work.

(b) Similar treaties were signed on

the same day by the plenipotentiaries of his Majesty, with those of the Emperor of Austria and the King of Prussia respectively.

34 Geo. 3. c. 68., and the 42 Geo. 3. c. 61. In the sixth section of the first of these acts it is enacted, "that no person shall load or carry in any ships or vessels whatsoever, whereof any stranger born (unless such as shall be denizens or naturalized,) be owner; part owner, or master, and whereof three-fourths of the mariners, at least, shall not be English, any fish, victual, wares, goods, commodities, or things, of what kind or nature soever, from one port or creek of England, Ireland, Wales, the Islands of Guernsey, Jersey, or the town of Berwick, to another port or creek of the same, or of any of them, under pain of forfeiting the goods and ship; one moiety to the king, and the other moiety to the informer." The object of this provision was to exclude foreign property from the coasting trade. The 1 Jac. 2. c. 18. extended this prohibition from foreign property to foreign built ships, which, as may be seen, were not included in the above clause of the act of navigation. By 34 Geo. 3. c. 68. no goods, wares, or merchandize, shall be carried from any port, member, or creek, or place of Great Britain, or of the islands of Guernsey, Jersey, Alderney, Sark, or Man, to any other port, member, creek, or place of the same, or of any of them, in any ship or vessel; nor shall any ship or vessel be permitted to sail in ballast from one of the said ports or creeks to another, unless such ship or vessel shall, respectively, be wholly and solely manned with, and navigated by, a master and mariners, all British subjects. The 42 Geo. 3. c. 61. extends this provision to Irish ships.

The Coasting Trade.

With the exception of several acts passed to prevent smuggling, which do not fall within the plan of this work, all the regulations of our coasting trade are contained in the above statutes. (a) The navigation law regards this trade to belong as peculiarly to British subjects, as the internal navigation of the country itself. Upon this principle the legislature confines it entirely to British ships, seamen, and capital. The prohibitions upon this head are so simple and unqualified, that no cases have arisen upon any of the statutes.

XXVIII. The next branch of the navigation laws is the fisheries, which being peculiarly adapted to form British seamen to maritime

The Fisheries.

(a) Masters of vessels, before they clear out coastwise, are required to give bond not to be concerned in any illegal transaction, 32 Geo. 3. c. 10.; and the owners are likewise required to give bond that the vessel be not illegally employed, nor out of the limits of her licence, 46 Geo. 3. c. 137.

and 56 Geo. 3. c. 104. There are several acts of parliament regulating the licences which are required to be taken out by vessels exceeding a certain burthen: but these acts belong to the details of revenue and custom, rather than to a treatise on the general law.

The Fisheries. experience and habits, have very early been distinguished by the active encouragement of the legislature.

It has been observed by some writers that our fisheries have not increased in the proportion of our commerce; and though our long line of coast, and the character of our population, appear peculiarly favourable to success and enterprize in that branch of industry, we have suffered other nations, and particularly the Dutch, to maintain a rivalry with us in our own waters, and to afford the principal supply of fish to the other kingdoms of Europe. But, within late years, this observation has ceased to be just. The Greenland and Southern whale fishery of Great Britain have long been without rivalry, and the circumstances of the late war have almost made it exclusively our own; whilst our herring fishery, under the encouragement of the legislature, has spread in every direction. The method of curing herrings is now so perfect, and so familiar to the British seamen, that we not only supply the Catholic population of Europe with fish, in preference to all other countries, but we are also enabled to ship large cargoes to the East Indies and South America.

XXIX. The British fishery acts are all specially exempted from the operation of the repealing act of 3 Geo. 4. c. 43. The existing rules of our fishery, under these acts, so far at least as they can fall under the cognizance of the courts of law, may be summarily stated to be as follows:—I. Every vessel, employed in the British fishery, must be British built, British owned, and must be manned and navigated by a master and mariners, *all* British subjects. 34 Geo. 3. c. 68. s. 4. and 42 Geo. 3. c. 61.—II. No fish whatever of foreign fishery, excepting only eels, stockfish, anchovies, turbot, lobsters, sturgeon, and caviare, can be imported into England. 18 Car. 2. c. 2. 10 and 11 Will. 3. c. 24. 1 Geo. 1. st. 2. c. 18.—III. All fish caught according to the first of these rules, that is to say, by British subjects, British ships, and duly manned, may be imported into Great Britain duty free.

The bounties to the several fisheries, so far as they are continued, belong rather to custom house statutes, and to known and practical regulations, than to a treatise on general maritime law. They are therefore omitted in this place. The regulations of the Greenland and South Wales fishery, and the statutes regulating the licences and limits, as respects the East India Company's charter, are omitted for the same reason. They admit no doubt in law.

CHAPTER II.

THE REGISTRY ACTS.

In this Chapter, it is proposed to treat of the Registry Acts, as forming that portion of our navigation system which is intended to crown and give effect to the whole. The registry of British ships is for the purpose of ascertaining their built and property; to confine the privileges given to such shipping to our own countrymen; to prevent foreigners from being concealed owners in them; and to render it impossible for our merchants to evade the laws for the maintenance and advancement of our naval interests.

Before we enter upon this subject it will be necessary shortly to state what the navigation laws had required as to the built and ownership of vessels, previous to the 26 Geo. 3. c. 60. and the new registry act, 4 Geo. 4. c. 41.

Original object of the Navigation Act, as to the built and ownership of British ships.

The principal object of the navigation act, as to the character of the shipping, was to provide that the vessel should be British property, which the legislature at that time deemed sufficient for the two ultimate ends of the system; the maintenance of the navy by the encouragement of sailors, and of commerce by the profits of the carrying trade and colonial monopoly. It was only in a more advanced state of the system that they began to look to the *built* of the ships, and therein to the further prosecution of our naval interests by the encouragement of docks, shipbuilding, and domestic artificers. Under these confined views in its original objects, the statute of 12 Car. 2. c. 18. was satisfied with requiring that the shipping, employed in the plantation trade, should *belong* to the people of this country, or, (allowing an alternative) should be of the *built* of, and belonging to the plantations. If the ship, therefore, were owned by persons in the mother country, it was immaterial where it was built: but if it was owned by some persons in the plantations, it must also have been built there. In the trade with Asia, Africa, and America, the ship might be owned by any subject of this country or the plantations, and nothing is said of the built. The act looked merely to the ownership. In the European trade, the act directs only that goods of the growth, &c. of Russia, (and the other enumerated goods in the eighth section,)

Original object
of the Navigation
Act, &c.

shall be imported in ships which *belong* to the people of England, Ireland, &c.; except currants and goods, the produce of the Turkish empire, which are not to be imported but in vessels of English built; the clause being silent as to the ownership. In the coasting trade no stranger is to be owner, or part owner, of a ship; but no provision is made to secure an English built: and in the fisheries the only rule was that the ships engaged therein should be *owned* by subjects of this country. And although in all these trades the act invariably required that the master and three-fourths of the mariners should be English, in the fishery nothing is said of the master and mariners.

What was to
be deemed
English ship-
ping under the
navigation act,
12 Car. 2. c. 18.

Lest any doubt should exist as to the term English shipping, where it was required, the seventh section of the navigation act defines what is to be understood by it; that is to say, "shipping built in England, Ireland, Wales, the islands of Guernsey or Jersey, or town of Berwick upon Tweed, or in any of the lands, islands, dominions, or territories to His Majesty in Africa, Asia, or America, belonging, or in his possession." And it provides that where any ease, abatement, or privilege, is given in the book of rates to goods or commodities imported or exported in English built shipping, it is always to be construed as extending only to *such* ships whereof the master and three-fourths of the mariners are English. And wherever it is required that the master and three-fourths of the mariners should be English, the act declares that the true intent and meaning of this provision is, that they should be such during the whole voyage, unless in case of sickness, death, or being taken prisoners in the voyage. And, in order to prevent frauds in *colouring*, (as the act terms it,) and buying foreign ships, the tenth section provides, that no foreign built ship shall be deemed or pass as a ship belonging to England, Ireland, &c., or enjoy the benefit and privilege of such a ship or vessel, until the person claiming the property in such vessel shall make appear to the chief officer of the customs in the port next to the place of his abode, that he is not an alien, and shall take an oath before such chief officer, that such ship was *bona fide*, and without fraud, bought by him for a valuable consideration, expressing the sum, as also the time, place, and persons from whom it was bought, and who are his partners, if he have any; all which partners are required to take the same oath before the chief officer of the customs of the port next to their abode; and that no foreigner, directly or indirectly, has any interest, part, or share therein. Upon taking this oath, the chief officer of the customs is to grant a certificate. A register of such certificates was to be

kept, and penalties were imposed upon officers of customs, who should allow the privilege of an English ship to any ship coming into port and making entry, until examination whether the master and three-fourths of the mariners were English; or who should allow such privilege to a foreign built ship, bringing in commodities the growth of the country where it was built, without examination and proof whether it was a ship of the *built* of that country, and that the master and three-fourths of the mariners were of that country. So, likewise, if any governor should allow a foreign built ship to load or unload before such certificate be produced, and examination made, whether the master and three-fourths of the mariners be English, such governor is for the first offence to be removed from his office.

We have seen that the act of navigation, except in two instances, was content simply with encouraging *property* in shipping, and was indifferent as to the built: but the benefits of the new system began soon to be felt, and it was the policy of the legislature to extend them. The 13 and 14 Car. 2. c. 11. provides, that for the better increase of shipping and navigation, the collectors of the customs in all the ports of England should forthwith give an account to the collectors and surveyors of the port of London of all foreign built ships in their ports, owned and belonging to the people of England, and of their built and burthen. The collectors and surveyors were further required to make a list of all such ships, and to transmit it to the Court of Exchequer, before 1st December, 1662, there to remain upon record. The act then provides, that no foreign-built ship, that is to say, not built in any of his Majesty's dominions of Asia, Africa, and America, or other than such as shall be *bona fide* bought before the 1st of October, 1662, and expressly named in the said list, should enjoy the privilege of an English ship, although owned or manned by English, (except such ships as were taken by letters of marque, or condemned as lawful prizes in the Courts of Admiralty,) but that all such ships should be deemed aliens' ships, and pay duties as such. The same act gave a bounty for seven years to persons building ships of three decks, or two decks and a half. The object of this provision was, for the increase of good and serviceable shipping, and for securing the public trade and commerce.

The next act for encouraging British shipping, 1 Jac. 2. c. 18. was by continuing certain payments and duties upon foreign-built ships, employed in the coasting trade.

Then follows the 7 & 8 Will. 3. c. 22. The professed object of this statute was to give a monopoly of the colonial trade, both in

Encouragement of British shipping by 13 and 14 Car. 2. and 1 Jac. 2.

System of registry introduced in the

Plantation
Trade by 7 &
8 W. 3. c. 22.

Ship's name
not to be
changed.

Forms to be
compiled with
on an altera-
tion in the
property of
any ship.

Further se-
curities re-
quired by 15
Geo. 2. c. 31.

Prize ships put
upon the same
footing as Bri-
tish-built
ships, and
ships built in
the Isle of
Man.

import and export, to British-built shipping exclusively, and to prevent frauds by colouring foreign ships under English names. In order to check this growing evil, it was proposed to institute a strict system of registry in the plantation trade. The act, therefore, provides that no ship should be deemed or pass as a ship of the built of England, Ireland, &c. or any of the plantations in America, so as to be qualified to trade to, from, or in the plantations, until the person claiming property therein should register it in the manner prescribed by the act. But this act exempts from registry fishery boats, hoys, lighters, barges, or any open boats or vessels, though of English or plantation built, whose navigation was confined to the coast. And it further enacts that no ship's name, when registered, shall be afterwards changed without registering such ship *de novo*, (which was also required to be done upon the transfer of property to another port) and delivering up the former certificate to be cancelled, under the before-mentioned penalties. And in case there should be any alteration of property in the said port, by the sale of one or more shares in any ship after registering thereof, such sale was always to be acknowledged by indorsement on the certificate of the register before two witnesses, in order to prove that the entire property in such ship remained to some of the subjects of England, if any dispute should arise thereupon.

The provisions of this act did not, however, wholly exclude frauds. The certificates of the register were often sold to foreigners; and such certificates being delivered to the purchasers, the ships of foreigners, under colour thereof, were introduced into the plantation trade. To prevent this practice, the 15 Geo. 2. c. 31. enacted that no ship required to be registered, and carrying goods, &c. to or from the plantations, should be permitted to trade, or be deemed qualified for that purpose, until the master, or person having charge of such ship, should upon oath, before the governor or collector of customs of the plantation where he arrived, give a just and true account of the name and burthen thereof, and of the place from whence she came, and of other particulars.

The statute next in order was the 20 Geo. 2. c. 45., by which prize ships, legally condemned, were put upon the same footing as British-built ships, and, with the same privileges, made subject to the same regulations. By 7 Geo. 3. c. 45., ships built in the Isle of Man, and owned by the King's subjects there, were directed to pass as British-built ships, upon the persons interested therein making proof of the built and property according to the forms of the 7 & 8 Will. 3.

But notwithstanding so many cautious restrictions, it was still found difficult to exclude foreigners from becoming largely interested in British ships; the 13 Geo. 3. c. 26. was, therefore, passed to stop the increase of this mischief. Amongst other things it recites, that many inconveniences had arisen from foreigners and other persons, not natural born subjects, becoming possessed of and entitled to any part or share in British ships; that, by reason of this practice, other part-owners of a ship could not obtain the register required by the act of William for the security of the navigation of the ship, whereby the trade and commerce of the kingdom had been greatly hindered and obstructed. In order, therefore, to prevent such abuses in the sale of shares of British-built ships to foreigners, this statute in express terms enacts, that no foreigner, or other person not being a natural-born subject, shall be entitled to, or shall purchase, or contract for, any part or share of any British ship or vessel belonging to natural-born subjects, without the consent in writing of the owner or owners of three-fourth parts in value at least of such ship or vessel first obtained and indorsed on the certificate of the register before two witnesses; otherwise such agreement, purchase, and sale, to be void. The last act, previous to the 26 Geo. 3. was the 18 Geo. 3. c. 56. By this act the plantation trade was thrown open to Ireland, and ships and vessels built and owned by his Majesty's subjects in that country were declared entitled to all the privileges of British-built vessels.

Foreigners not to contract for a share in a British ship without consent of the owners of three-fourths in value.

We now come to the celebrated act of the 26 Geo. 3. c. 60. The changes which had happened in America, and the prospect of an independent commercial state about to arise in the vicinity of our colonies, suggested the necessity of some stricter regulations as to our plantation trade. Frauds, as respected our shipping, were of frequent occurrence in our colonies; and British vessels, with plantation registers, were constantly sold or fraudulently transferred to foreigners. An improved system of registration was likewise deemed necessary to check the enormous growth of smuggling. This evil, it was thought, might be restrained, if every vessel were to be registered at the port to which she belonged. The true name of the vessel might then be easily ascertained, together with the name of the master and of the port. And if the names and occupations of all the owners were required to be described, before a certificate of registry could be granted, it might be expected that many persons would be discouraged from engaging in the building, equipping, and employing vessels of this description, from the apprehension that their names must appear; and if such ships were made subject to forfeiture on being found

Origin and policy of the modern registry acts.

Origin and
policy of the
modern regis-
try acts.

without a register, they could not escape under the colour of foreign documents. (a)

These were some of the principal reasons which suggested an alteration in the system of registry. The defects in the old registry laws were obvious; and the principal one was, that evasion was easy. As the law stood, registers were granted in pursuance of the 7 & 8 Will. 3., and 15 Geo. 2. c. 31. The act of William confined the trade to and from the plantations to British-built ships, owned by British subjects; or to foreign ships taken as prize, and legally condemned: but notwithstanding no other sort of ship was entitled to a register, it had been the practice to grant registers to foreign ships wrecked or stranded on the coasts of this kingdom, on their being purchased and repaired by British subjects; and foreigners, not only in our colonies, but in all parts of the world, were found interested in British vessels. (b) Many other inconveniences were experienced under the old system; and, more especially, the difficulty of tracing the property in ships, and their transfer from one owner to another. And when it was considered how great was the national stake in this species of property, and how considerable a part it composed, not only of the wealth but of the actual defence of the kingdom, it was deemed expedient to mature a system which should provide for the prosperity and security of shipping above all other things; which should obtain for British vessels a decided preference in all quarters of the world; which should confine to our own docks, shipwrights, and artificers, advantages heretofore shared with others, and which should communicate to the public such precise information with respect to the extent and nature of this kind of property, as effectually to prevent foreigners from becoming engaged in it to the hazard of so many important interests. The 26 Geo. 3. c. 60. was therefore passed, and followed up by other acts of amendment and improvement. The public are indebted for this system, and for this system in almost its present state of completeness, to the industry and ability of the late Earl of Liverpool, a nobleman who, without ostentation, did more to uphold the maritime predominance of this country than almost any man who has preceded or followed him. According to this system of law, every British vessel now effectually sails under a specific licence, which is granted to her by the appointed officer, upon the verification of her being British built, and possessing all the other qualifications which the law requires; and which licence, on the other hand, is refused if she have not

Lord Liver-
pool's acts,
26 Geo. 3. c. 60.
and 34 Geo. 3.
c. 68.

(a) Reeves, 401.

(b) Reeves, 403.

complied with the conditions of the law. The great object of our navigation laws, as we have before had occasion to remark, is to confine our trade, and all its privileges, to our own mariners and shipping; to ships, the property of our own merchants, and the built of our own country. The object of the registry acts is to second and enforce this national purpose, by compelling every vessel claiming to be British, to make an enrolment of her name, tonnage, property and built, that she may every moment, and invariably, be before the public eye, and that foreigners may be prevented from having any interest in her. The policy of these acts may not be at first perceived. The proper point under which they are to be considered is that of completing the system of our navigation laws; an object which they effect by bringing its principal subjects, ship-owners, ships, and sailors, under the distinct view of the law, and, by the registration of every act of transfer, effectually preventing those opportunities of evasion which would follow by a confusion of identity.

Origin and policy of the modern registry acts.

II. In the developement of the registry system, which we are now about to subjoin, we shall distribute the law of registration, as it now exists, into the several heads into which the new act, (4 Geo. 4. c. 41.) has cast it. And, first, as to the ships which must be registered, and which are required to be so.

III. Until the 4 Geo. 4. c. 41.. the laws relating to the registration of ships were distributed through the several statutes, to which, for the purpose of illustrating this system, we have referred above. The law of registration having been thus rendered inconveniently complicate, and the letter of the several acts pressing in many cases, very hardly, against the property of merchants and ship-owners, the 4 Geo. 4. c. 41. was at length passed for the avowed purpose of administering a remedy to this evil. By this act, all the former registry acts (except where expressly mentioned as we proceed) are effectually repealed, and their several provisions consolidated and re-enacted with such alterations, as were found, by experience, to be suited at once to the object of the act, to the new forms of commerce and commercial dealing, and to the nature of the property to which the statute applies.

The new registry system, 4 Geo. 4. c. 41.

The new registry consolidation act, 4 Geo. 4. c. 41.

The 4 G. 4. c. 41. adopting the spirit and the principles of the 26 G. 3., enacts, that all merchant vessels employed upon the seas, having a deck or being of the burthen of fifteen tons or upwards, and built in Great Britain, or Ireland, Jersey, Guernsey, the Isle of Man, or in some of the colonies or territories in Asia, Africa, or America, belonging to his Majesty, or in Malta, Gibraltar, or Heligoland, and all such ships as shall have been condemned in

What ships are to be registered by 4 Geo. 4. c. 41.

any Court of Admiralty as prize of war ; and such ships and vessels as shall have been condemned in any competent court, for the breach of the laws made for the prevention of the slave trade, and which shall wholly belong, and continue wholly to belong, to his Majesty's subjects, shall be required and authorized to be registered, and to receive a certificate of such registry, the form of which certificate shall be as follows, *videlicet* : (a)

Certificate of
Registry
under the new
act 4 Geo. 4.
c. 41.

This is to certify, that in pursuance of an act passed in the fourth year of the reign of King George the Fourth, intituled *An Act for the registering of Vessels*, [here insert the names, occupation, and residence of the subscribing owners,] having taken and subscribed the oath required by this act, and having sworn that [he or they] together with [names, occupations, and residence of non-subscribing owners] [is or are] sole owner or owners in the proportions specified on the back hereof, of the ship or vessel called the [ship's name] of [place to which the vessel belongs] which is of the burthen of [number of tons] and whereof [master's name] is master ; and that the said ship or vessel was [when and where built, or condemned as prize, referring to builder's certificate, judge's certificate, or certificate of last registry, then delivered up to be cancelled] and [name and employment of surveying officer] having certified to us that the said ship or vessel has [number] decks, and [number] masts ; that her length from the fore part of the main stem to the after part of the stern post aloft is [number of feet and inches] ; her breadth at the broadest part [stating whether that be above or below the main wales] is [number of feet and inches] ; her [height between decks, if more than one deck, or depth in the hold, if only one deck], is [number of feet and inches] ; that she is [how rigged] rigged with a [standing or running] bowsprit, is [description of stern] sterned, [carvel or clinker] built, has [whether any or no] gallery, and [kind of head, if any,] head ; and the said subscribing owners having consented and agreed to the above description, and having caused sufficient security to be given, as is required by the said act, the said ship or vessel called the [name] has been duly registered at the port of [name of port]. Certified under our hands, at the Custom House, in the said port of [name of port] this [date] day of [name of month] in the year [words at length.]

(Signed) _____ Collector.

(Signed) _____ Comptroller.

And on the back of such certificate of registry, there shall be an

(a) 4 Geo. 4. c. 41. s. 2 & 5. See the act in the Appendix.

account of the parts or shares held by each of the owners mentioned and described in such certificate, in form and manner following :

Indorsements on the certificate of registry.

Names of the several owners within mentioned.

Number of sixty-fourth Shares held by each owner.

Name

Thirty-two.

Name

Sixteen.

Name

Eight.

Name

Eight.

(Signed) _____ Collector.

(Signed) _____ Comptroller.

Upon such registration, and not till then, such vessel is entitled to the privileges of a British ship, and shall be subject to forfeiture if attempting to exercise any such privilege before registry. (a) But British ships captured by the enemy, and sold to foreigners, are not to be entitled to registry, unless where seized or re-taken by a British ship of war, and duly condemned by a Court of Admiralty as prize of war, or for breach of the slave trade laws. (b) All other ships whatsoever, although owned by British subjects, (i. e. all ships unregistered, or not entitled to registry,) are to be considered as alien ships.

What are alien ships.

IV. And as frequent frauds were committed both against owners and against the registry acts, by the practice of selling ships abroad as unseaworthy, it is enacted by this act, (c) that when any British ships shall be declared to be unseaworthy and incapable of being repaired to the advantage of the owners, and shall for such reason be sold, such shall be deemed to be a ship lost or broken up to all intents and purposes, and shall never be again entitled to registry.

Of ships which are unseaworthy.

V. And to prevent another frequent fraud, namely, that of Americans and others using the names of British owners, resident abroad, no subject whose usual residence is in any country not under the dominion of his Majesty, is to be entitled to be an owner in whole or part of any ship during such residence, unless he be a member of some British factory, or agent for, or co-partner in, a house or co-partnership actually carrying on trade in Great Britain or Ireland. (d)

Who may be owners.

VI. As the above clauses require all British built ships to be registered, and allow such ships *only* to be registered, the next object of the registry act is to secure and confine the construction of British ships to his Majesty's subjects, and to prevent any fraa-

(a) 4 Geo. 4. c. 41. s. 4.

(c) 4 Geo. 4. c. 41. s. 7.

(b) Same act, s. 8.

(d) Same act, s. 11.

Of repairs in a
foreign port.

dulent dealing therein. To this end it is next enacted, (b) that no ship shall be deemed British built, or shall continue to enjoy the privileges of a British ship, if *repaired in a foreign port, at an expense exceeding twenty shillings per ton*, unless such repairs shall have been necessary by reason of extraordinary damage sustained during her absence from his Majesty's dominions; and to enable her to perform her voyage, and to return to some port in the King's dominions; and whenever any ship, so repaired at a rate exceeding twenty shillings per ton, in a foreign port, shall arrive at any port in the King's dominions, the master shall immediately upon arrival report such repairs to the collector of the port; and if the necessity of such repairs shall be then proved to the satisfaction of the commissioners of the customs, they shall direct the collector of the port to certify on the ship's certificate of registry, that the privileges of the ship have not been forfeited by such excess of repair above twenty shillings.

What persons
may make re-
gistries, and
grant certi-
ficates.

VII. The persons (b) authorized to make registry and to grant certificates are, 1. The collector and Comptroller of his Majesty's customs in any port in the United Kingdom of Great Britain and Ireland, and in the Isle of Man respectively, in respect of ships to be there registered. 2. The principal officers of the customs, together with the governor, lieutenant governor, or commander in chief, in the island of Guernsey and Jersey, in respect of vessels to be there registered. 3. For colonial registers, the collector and comptroller of the customs of any port of the colony, together with the governor, lieutenant governor, or commander in chief, in respect of vessels to be there registered. 4. For ships registered in India, the collector at any port in the East Indies, or the senior merchant, or any other person of six years' standing in the company's service, who may be respectively appointed by any local government to act in execution of this statute. 5. And with respect to ships to be registered in Malta, Gibraltar, Heligoland, and the Cape of Good Hope, such registers are to be made before the governor, lieutenant governor, or commander in chief, upon those stations. But the registry of ships in India is not to entitle such ships to the privileges of British ships in any trade beyond the limits of the company's charter, except where it is otherwise specified in the 53 Geo. 3. Nor are ships built at Malta, Gibraltar, or Heligoland, to be entitled to the privilege of British ships, as to the colonial trade between Great Britain and her other colonies.

Place of re-
gistry.

VIII. As to the *place of registry*, the act requires that ships shall

(a) 4 Geo. 4. c. 41. s. 6.

(b) Same act, s. 3.

be registered at the port only to which they respectively belong ; unless where sufficient cause shall be shewn to two commissioners in England, Ireland, or Scotland (or to the governors, &c. in the colonies), in which case such commissioners or governor may authorise the registry in another port. (a)

IX. As regards the port to which every ship shall be deemed to belong, the statute enacts that every vessel shall be deemed to belong to some port at or near to which some or one of the subscribing owners shall reside ; and whenever such owner or owners shall have transferred all his or their share in any such ship, such ship shall be registered *de novo*, before she shall depart from the port to which she shall then belong, or from any port in the same kingdom or colony with her home port. But if such registry *de novo* cannot be made before the ship shall sail, the officer of the port shall indorse upon her certificate of registry his permission, that the ship may make one voyage. And where ships are built in any of our colonies for owners resident in the United Kingdom, the collector or other officer of the colonial port shall give a certificate, by authority of which certificate the said ship may proceed on its voyage for the United Kingdom, there to be duly registered. (b)

Of the ship's proper port.

X. Before obtaining a certificate, the *oath* following must be taken before the officers of registry by the subscribing owners. If such ship shall be owned by one person only, the oath must of course be taken by such single owner. If there be two joint-owners, the oath must be taken by both such joint owners, if both shall be resident within twenty miles of the port where such registry is required, or by one of such joint-owners, if one or both of them shall be resident at a greater distance ; or if the number of such owners shall exceed two, the oath shall be then taken by the majority, if the majority shall be resident within twenty miles, not exceeding three of such owners, or by one of such owners, if all shall be resident at a greater distance. And in case the required number of part-owners shall be hindered by ill health from giving their personal attendance, any attendant single owner shall then further add to his own oath, that the other part-owners, then absent, are either not resident within twenty miles of the port of registry, or have not wilfully absented themselves in order to avoid taking the oath, but are hindered by illness. (c)

Of the oath to be taken by an owner, or joint owners, &c.

I A. B. of [place of residence and occupation] do make oath Form of oath.

(a) 4 Geo. 4. c. 41. s. 3 and 9.

(c) 4 Geo. 4. s. 12 and 13.

(b) Same act, s. 10.

Form of oath.

that the ship or vessel [name] of [port or place] whereof [master's name] is at present master, being [kind of built, burthen, &c. as described in the certificate of the surveying officer] was [when and where built, or if prize, capture, and condemnation] and that I the said A. B. [and the other owners' names and occupations, if any, and where they respectively reside; videlicet, town, place, or parish and county; or if member of, and resident in any factory in foreign ports, or in any foreign town or city, being an agent for or partner in any house or co-partnership, actually carrying on trade in Great Britain or Ireland; the name of such factory, foreign town or city, and the names of such house or co-partnership] am [or are] sole owner [or owners] of the said vessel, and that no other person or persons whatever hath or have any right, title, interest, share, or property therein or thereto; and that I the said A. B. [and the said other owners, if any] am [or are] truly and *bona fide* a subject [or subjects] of Great Britain; and that I the said A. B. have not [nor have any of the other owners, to the best of my knowledge and belief,] taken the oath of allegiance to any foreign state whatever, [except under the terms of some capitulation, describing the particulars thereof,] or that since my taking [or his or their taking] the oath of allegiance to [naming the foreign states respectively to which he or any of the said owners shall have taken the same] I have [or he or they hath or have] become a denizen [or denizens, or naturalized subject or subjects, as the case may be] of the United Kingdom of Great Britain and Ireland by his Majesty's letters patent, or by an act of parliament [naming the times when such letters of denization have been granted respectively, or the year or years in which such act or acts for naturalization have passed respectively]; and that no foreigner, directly or indirectly, hath any share or part interest in the said ship or vessel.

Survey to be made previous to the certificate.

XI. In order to enable the officers of the customs to grant the certificate of registry, some person appointed by the commissioners must, previous to the actual registry, go on board the vessel, and make the necessary survey as to every particular to be contained in the certificate. He must then make a report in writing to the officers of customs appointed to register the ship; and the master, or other agent of the owner, must subscribe his name to such report. (a) The mode of admeasurement is to be that prescribed in the 15th section, for ships on shore; and that prescribed in section 16 of the same act, for vessels measured when afloat. In

(a) 4 Geo. 4. c. 41. s. 14, 15, and 16. See the act in the Appendix.

steam vessels, the engine-room is to be deducted; and when the tonnage has been so ascertained it is to be final. (a)

XII. At the time of registry, the act requires that the master and the subscribing owners, or as many of them as are required to attend to make registry, shall enter into a bond with penalties from one hundred to a thousand pounds, (according to the tonnage of the vessel, from fifteen to three hundred tons and upwards,) that the certificate shall be solely made use of for the service of the vessel, and shall not be sold, lent, or otherwise disposed of, to any person whatever; and that in case the ship shall be captured, burnt, broken up, shall have forfeited the privileges of a British ship, or shall have been seized and legally condemned for illicit trading, or shall have been taken in execution for debt, and sold by due process of law, or shall have been sold to the crown, or shall under any circumstances have been registered *de novo*, the certificate, if preserved, shall be delivered up, (within one month after the arrival of the master in any British port) to the registering officers of such port. In the case of the sale of the ship in any port to foreigners, the certificate to be delivered to the officers of customs (or if abroad to the British consul) within seven days after such sale. But if the master shall be then at sea with the ship, then the certificate to be delivered within fourteen days after the arrival of the master at any British port. If the ship at the time of registry be at any other port than that of registry, and the master with her, the master may there give a separate bond. (b) When the master is changed, the new master must give a similar bond; and his name shall be indorsed by the officers of customs (at the port where the change takes place) on the certificate of registry, which the old master must deliver to those officers for that purpose. (c) And if any person, for whatever cause, shall be in possession of the certificate at the time, (or at any other time where the act requires it to be given up) and shall wilfully detain it after demand, he is liable to all the penalties of the bond. (d)

Of the bond to be given by the master and owners.

XIII. The name of the ship, as named in the register, is to be painted on the stern, and is never afterwards to be changed. (e)

Ship's name not to be changed.

XIV. When applying for certificate of registry, the owners, &c. must produce the builder's certificate, stating the time when, and the place where, the ship was built, and also an account of the

(a) 4 Geo. 4. c. 41. s. 17. and 18.

(d) 4 Geo. 4. c. 41. s. 21.

(b) Same act, s. 19.

(e) Same act, s. 22.

(c) Same act, s. 20.

Of the builder's certificate.

tonnage, and the name of the first purchaser or purchasers. The owners must also make oath that the ship, for which such certificate is required, is the same with the one described in the builder's certificate. (a)

Certificate of registry lost or mislaid.

XV. In case the certificate of registry shall be lost or mislaid, and due proof of such loss be given, the commissioners may permit a registry *de novo*; and in case of the absence of the ship in a distant port, may grant a temporary licence for the present use of the ship. But the owners, in such case of a registry *de novo* must give a bond that the certificate, if thereafter found, shall be delivered up; and that, with their privity, no illegal use has been made of it; and the master, if in the British dominions, must make oath that the ship has been *before* duly registered, naming the port where and the time when. If the master be absent, the registry *de novo* shall be still granted to the owners, upon such owners taking the oath required by the act; and shall be then forwarded to the collector of any other port to be given to the master, upon his taking the oath required, and delivering up any licence which he may have for present use. (b)

Of persons detaining the certificate of registry.

XVI. And as it might lead to the greatest inconvenience, public as well as private, if any person under any pretence should detain the certificate of registry, it is enacted that in case the master of any ship, or any other person, who shall have received the certificate for any purpose whatever, shall wilfully detain it from the officers of customs, the owner may thereupon make oath of such detainer before the nearest justice of peace, upon which the said justice may issue his warrant for the apprehension of such master or other person so detaining it; and, if upon examination he shall be satisfied that the certificate is not lost or mislaid, but is wilfully detained, he shall convict such person in the penalty of one hundred pounds. And the said justice shall further certify such detainer to the officers of customs, who shall thereupon make a registry *de novo* of the ship, and grant a new certificate. The same registry *de novo* shall be granted in case the master shall have absconded with the certificate. (c)

XVII. If the ship be altered in any way so as not to correspond with the description in the registry, the ship must be registered *de novo*, otherwise she will be deemed a ship not duly registered. (d)

XVIII. In the case of vessels condemned as prize or for breach of slave laws, the purchasers upon applying for registry must pro-

(a) 4 Geo. 4. c. 41. s. 23.

(b) Same act, s. 24.

(c) 4 Geo. 1. c. 41. s. 25.

(d) Same act, s. 26.

duce certificate of condemnation. (a) And no prize vessels to be registered except in the ports of Southampton, Weymouth, Exeter, Plymouth, Falmouth, Liverpool, and Whitehaven. (b)

Of vessels condemned as prize.

XIX. All transfers of any interest in a ship must be made by bill of sale, in writing, reciting the certificate of registry, or the principal contents thereof. But such bill of sale is not hereafter to be void by reason of any error in such recital. (c)

Transfers of ships not void by reason of error.

XX. In all ships owned in part, the property of such ship is to be considered to be divided into sixty-four shares or parts, and no person can hereafter be entitled to be a registered owner in respect of any less proportion than an integral sixty-fourth part. Upon the first registry of all vessels, the subscribing owner must add to his oath the number of such shares holden by each owner, and the same will be registered accordingly. But if the property of any owner cannot be reduced by division into any number of integral sixty-fourth parts, the fractional parts may be conveyed by memorandum upon the bill of sale, and without any new stamp. Mercantile partners, described as such in the registry, are not required to distinguish their proportionate shares; and any ship, or shares of a ship, so holden by mercantile partners, shall be deemed in all respects partnership property. (d)

Property in ships to be divided into sixty-four parts and shares.

Of mercantile partners.

XXI. No greater number of persons than thirty-two can be part-owners at one time. But this is not to affect the equitable title of minors, heirs, legatees, creditors, or others, duly represented. And where any number of persons have associated themselves as a joint stock company for the purpose of holding any ship or ships in shares, and have elected any number of themselves (not less than three) as trustees of such property, in such case the registry of the ship or ships may be granted to such trustees; such trustees taking the oath, and stating the name and description of the company as owners. In ships belonging to corporate bodies the same oath is to be taken by the secretary of such body, and the corporate body is to be described by name. (e)

Only thirty-two persons to be owners at any one time.

XXII. As it is the purpose of the act to have a clearer statement of all vessels owned in shares than it was usual to give in the registry under the old acts, it is enacted, (f) that whenever any ship shall hereafter be registered *de novo*, the number of shares, in any ship owned in parts, shall be registered so far as the same is practicable; and to that end the subscribing owners shall produce

Shares to be registered, on a registry *de novo* under this act.

(a) 4 Geo. 4. c. 41. s. 27.

(d) Same act, s. 30.

(b) Same act, s. 28.

(e) Same act, s. 31.

(c) Same act, s. 29.

(f) Same act, s. 32.

When share owner cannot be ascertained.

all the bills of sales or other documents of transfer. But if the registry of such ship, then in force, shall be the first registry, and the shares shall remain the same as at the time of such registry, and the owners the same; the subscribing owners may make oath of the fact, instead of being required to produce the bills of sale. And if the owners shall make oath that the bills of sale cannot be produced, and that they cannot give any certain account or proof of the shares, the officers of customs may grant registry without requiring such statement.

Within two years all vessels, and shares thereof, must be registered, unless time be given, &c.

XXIII. It is made an indispensable requisite by this act, that on or after the expiration of two years from the 31st day of December, 1823, or from and after the first arrival of any ship, (after the expiration of such two years) in her own port in any part of the United Kingdom, or in any port of the same colony with her own port, every ship shall be registered according to the mode prescribed in 4 Geo. 4. c. 41., inasmuch as it is provided that no other certificate of registry shall be in force, except such as shall have been made and granted under the authority of that act, and in which the share of each owner shall be duly set forth, unless where the collector or other officer of the ship's port shall have certified on the certificate of registry, that further time has been given by the commissioners of customs. (a)

XXIV. No stamp duty is to be paid on the *first* registry (under this act) of any vessel which shall have been before registered. (b)

When a bill of sale is effectual to pass the property in a ship.

XXV. And no bill of sale, mortgage, or other instrument in writing is effectual to pass the property in a ship, until it shall have been produced to the proper officers of customs, entered in the book of registry, and indorsed on the certificate. The form of such entry to be as follows:—

Form of entry at the custom house.

Custom house, [*port and date, name, residence, and description of vendor or mortgagor*] has transferred by (bill of sale or other instrument) dated [*date, number of shares,*] to [*name, residence, and description of purchaser or mortgagee.*]

A. B., Collector,

C. D., Comptroller.

The registering officers are ordered to make such entry; and further, upon being required to do so, to certify by indorsement on the bill of sale or mortgage, that such registry and entry have been made. (c)

XXVI. After such entry and indorsement, on the certificate of re-

(a) 4 Geo. 4. c. 41. s. 33.

(b) Same act, s. 34.

(c) 4 Geo. 4. c. 41. s. 35.

gistry, of such bill of sale or mortgage; such bill, &c. shall be valid to pass the property concerned, as against every person whatever, and to all intents and purposes, except as against such subsequent purchasers, as shall first procure the indorsement to be made upon the certificate of registry, as mentioned in the preceding rule. (a)

Entry of bill of sale valid, except in certain cases.

XXVII. When a bill of sale or mortgage shall have been so entered in the book of registry (the certificate of registry not being produced at the time of registry) the collector, or other registering officer, shall allow thirty days for the production of such certificate, in order to have the due indorsement made upon it; and (before the expiration of such thirty days) he shall not receive and enter any other bill of sale for the transfer of the same ship or share. In case the ship shall be absent from her port at the time of such entry, the collectors shall receive no such other bill of sale for the same ship or same share, until thirty days shall have elapsed from the day on which the ship shall arrive at the port to which she belongs. In every case where there shall at any time happen to be two or more transfers by the same owner, of the same property, in any ship entered in the book of registry, the collector is required to indorse upon the certificate of registry the particulars of that bill of sale or mortgage, under which any person claims property who shall produce the certificate of registry for that purpose within thirty days next after its entry in the book of registry; or, in case of the absence of the ship at the time of entry, within thirty days next after the return of the said ship to her port. In case no such certificate should be produced within either of the spaces of thirty days, the collector is then to indorse upon the certificate of registry the particulars of any bill of sale or mortgage belonging to such person as shall first produce the certificate of registry for that purpose. In cases of certificates being lost or mislaid, or wilfully detained, and due proof thereof being given to the commissioners of customs, such commissioners are allowed to grant further time, or a registry *de novo*. But a specific application must be made for further time; and the collector must make a memorandum in the book of registers that such a further time has been granted, during which prolonged time no other bill of sale for the same property shall be received. It being the true intent and meaning of this act, that the several purchasers or mortgagees of any ship or share (when more than one appear to claim the property) shall have priority over the other, not according to the

When a bill of sale has been entered; what time shall be allowed for the indorsement on the certificate of registry, before any other bill of sale shall be entered.

(a) 4 Geo. 4. c. 41. s. 36.

respective times when the bills of sale or mortgagees were entered in the book of registry, but according to the time when the *indorsement* has been made on the certificate of registry. (a)

Bill of sale may be produced, after entry, at other ports than those to which vessels belong, and transfers indorsed on the certificate, &c.

XXVIII. Every bill of sale and mortgage must be first entered with the officer at the port to which the ship belongs: but after such first entry shall have been recorded at the port to which the vessel belongs, such bill of sale or mortgage may be produced, (together with the certificate of registry) at any other port for the purpose of being indorsed on the certificate of registry, provided only that the registering officers of such other port shall first give notice to the officers of the port to which such ship belongs, of such requisition being made to them to indorse the certificate of registry, and shall await a report from such officer, whether any other bill of sale has been recorded in the ship's port; and upon receiving such report, the registering officer shall proceed to indorse the required bill of sale, and any other bill of sale mentioned in their report in their due order. (b)

Of a registry, *de novo*, &c.

XXIX. If, upon a registry *de novo* of any ship, it shall appear that any share has been sold since she was last registered, and that the transfer of such share has not been recorded and indorsed, the bill of sale of such share must then be produced; and if not produced, will not be noticed in such register *de novo*. But if the bill of sale is not or cannot be produced at such time, it may be afterwards produced and indorsed upon the certificate of registry. (c) And upon any change of property in a ship, if the owner shall desire a register *de novo* for the purposes of convenience, the registering officers may grant such a registry *de novo*, although such new registry be not required by the act. (d)

Bill of sale, previous to such registry, may afterwards be recorded.

Evidence under this act.

XXX. Instead of the original affidavits made by owners, being as heretofore, the customary and usual evidence of property in ships, or shares of ships, in courts of law, it is enacted by this statute, that copies and extracts from the books of registry shall hereafter be sufficient, and that the registering officers shall permit such copies to be taken when any reasonable request shall be made. (e)

Of agents making sale, &c.

XXXI. And as it has frequently happened that agents, duly authorized for the purpose, have made a due and lawful sale of a ship or share belonging to their principal, but that such agents has not received a legal power to execute the same bill of sale in

(a) 4 Geo. 4. c. 41. s. 37.

(d) Same act, s. 40.

(b) Same act, s. 38.

(e) Same act, s. 41.

(c) Same act, s. 39.

all its parts and requisites, it is provided by the act that the commissioners may permit a record of such sales or registry *de novo*, as the case may require, upon proof of the fair dealing of the parties. And in all cases where any bill of sale cannot be produced, the commissioners, upon proof to their satisfaction of the fair dealing of the parties, may permit a registry *de novo* without the production of the bill of sale. Provided only, that due security be given to produce legal powers, or to abide future claims. (a)

Of agents
making sale,
&c.

XXXII. The following section of the act is of the first importance and benefit to commerce. Where a transfer of any ship or share shall be made only as a security for the payment of a debt (either by way of mortgage, or of assignment to trustees,) the entry in the book of registry, and the indorsement upon the certificate of registry, shall state that such mortgage or assignment was made *for such purpose*. It is then expressly enacted, that such mortgagee, assignee, or trustee, shall not be deemed an owner; nor shall the assignor or mortgagor be deemed out of possession of the part so mortgaged or assigned, or cease to be regarded as the owner, except so far as may be necessary for the purpose of rendering the ship, or share, available by sale for the purposes of the mortgage. (b)

Of the mort-
gage of ships.

XXXIII. The next section controuls the operation of the 21 J. 1., with respect to shipping; and enacts that where a mortgage, assignment, or other transfer of a vessel, or any share thereof, for security of debts has been duly registered, the mortgagee or assignee shall not be affected by any act of bankruptcy committed by such mortgagor or assignor after the time of such registry, notwithstanding such mortgagor or assignor may at the time have the *reputed possession, order, and controul* of the property so mortgaged or assigned. But such registered mortgage is to take precedence of any right or interest which may belong to the assignees. (c)

The act of 21
Jac. 1. c. 19.
limited in its
operation, as
to property in
ships.

XXXIV. This useful and excellent statute then concludes by enacting, that the commissioners in Scotland and Ireland shall monthly transmit to the commissioners in England copies of all certificates by them granted; that governors abroad may cause all legal proceedings touching the registry of ships to be stayed, until his Majesty's pleasure shall be known; that all false oaths shall incur the common law penalties of perjury; and that persons falsifying any document required by the act shall forfeit the sum of

Duty of com-
missioners.

(a) 4 Geo. 4. c. 41. s. 39.

(c) 4 Geo. 4. c. 41. s. 44.

(b) Same act, s. 43.

five hundred pounds. Penalties are to be sued for, and disposed of, as penalties under the custom laws. (a)

Administration of the former registry acts in the courts of law and equity, 26 G. & A. 68.; and 34 G. & A. 69.

Having thus detailed the principal provisions of the new registry act, we believe it cannot escape the observation of the reader, that it abounds in many particulars, at once complicate and minute, and difficult, perhaps, to reduce to practice as the necessities of commerce may require. But, notwithstanding its formalities, it is not to be doubted but that the present act will be found better adapted to effect the purposes for which it is intended, than any of the preceding statutes. The old registry acts sometimes introduced much perplexity in questions of title to shipping, and were occasionally employed to supersede equity by the formalities of the law: but in a course of practice, and as they were fully investigated and understood, the rigorous construction of them, which once prevailed in our courts of justice, had gradually been softened down, and made to yield to more equitable and practical considerations. They were properly maintained, in their substance, as the basis of the navigation of the country; but were construed latterly, in our courts of justice, not with literal strictness, but as a system of laws founded on great purposes of public policy; open to considerations of natural equity, and yielding in their letter to cases of unavoidable accident and invincible necessity. The courts, therefore, did not exclude that construction which the urgency of a case will often require, but administered them with the exercise of fair discretion under difficulties and doubts. In all questions, therefore, upon these laws, it will be found in the cases which we are about to consider, that the courts never lost sight of their original purpose, and never gave them a larger authority than what belonged to them with reference to their leading object. The law required a compliance with the general provisions of these statutes in order to constitute a perfect title to shipping; and it annulled (in the nature of a condition subsequent, defeating a previous title upon the omission of certain acts,) all contracts for an interest in ships in which any of the substantial requisites were wanting. In this respect, indeed, as in most others, the registry acts bear a strong analogy to the revenue acts. The strict observance of the revenue acts is enforced for the purposes of revenue. The strict observance of all the forms of registration,

(a) 4 Geo. 4. c. 41. s. 45, 46, 47, 48. See the Act printed at full in the Appendix.

as respects shipping, is required for the great maritime interests of the country. But, in both cases, these formalities are merely modes of title: they in no respect alter the nature of a contract.

Before we enter upon a review of the cases under the old registry acts, which we shall touch but very slightly, as the utility of them is nearly superseded by the new act, 4 Geo. 4. c. 41., it must be allowed us to observe, that although these registry acts were chiefly framed upon political views, they have been found, in their execution, most admirably to combine the public interests of the state with the private advantages of the merchant; and, therein, to indemnify the latter for the numerous and complicate forms which they prescribe.

I. A registry is not a document required by the law of nations as expressive of a ship's national character. (a) Indeed the registry acts are altogether to be considered as forms of municipal institution, and scarcely any traces of a like system are to be found in the laws of any other nation. So, likewise, a foreign built ship, British owned, is not required to be registered. (b) The policy of the navigation law and of the registry acts generally is to confine our commerce as much as possible to British-built ships, and with this purpose to confer certain privileges upon such ships to which foreign vessels are not entitled; and in some trades, as in the colonial and coasting trade, to inflict a forfeiture on any foreign vessel engaging therein. But it was not the policy of the Legislature to prevent British subjects altogether from employing foreign ships in neutral trade in as ample a manner as they can be employed by aliens. The disability, therefore, of foreign ships is this, that they cannot be employed in certain trades; that they cannot procure a registry, and, therefore, cannot become entitled to the privilege of British-built ships: but, though they cannot be registered, British subjects are not prohibited from owning and navigating them, or employing them on certain occasions. There is a sufficient security, however, for their not being extensively employed, as they are liable to increased duties, and other disadvantages from which British-built shipping is exempted. The registry acts indeed, by taking from these vessels the privileges of British shipping, have nearly put an end to foreign ships, British owned, being employed in any trade whatever.

Cases and decisions.

Of foreign ships British owned; their privileges and disabilities.

II. Doubts had formerly existed on the 26 Geo. 3. c. 60. as to the precise distinction between the privileges of British-built ships,

(a) *Le Cheminant v. Pearson*, 4 Taunt. 267. (b) *Long v. Duff*, 2 Bos. and Pul. 209.

To be deemed alien ships, and subject to duties, penalties, &c.; but not a prohibited property to British subjects.

and foreign ships British owned; that doubt was removed by the 27 Geo. 3. c. 19. which declares that all ships not entitled by the 26 Geo. 3. to the privileges of British-built or British-owned vessels, and all ships not registered according to the said act, shall, although owned by British subjects, be deemed alien ships, and be liable to the same increased scale of duties, and to the same penalties and forfeitures as alien ships. The 4 Geo. 4. c. 41. confines, in like manner, the privileges of British shipping to ships which are duly registered; and no ships are entitled to be registered, unless they are built according to the provisions of the fifth and sixth sections of that act. The result, therefore, seems to be this, that foreign ships are under great disabilities, but they are not a prohibited property. British subjects may be owners of them, and may navigate them, except in certain branches of commerce: but they are not entitled to any of the privileges of British-built ships, and cannot be registered.

Of foreign ships, British owned.

III. A foreign built ship, owned in part or in whole by British subjects, is under disabilities not attaching to such ship if British subjects had no share or interest in her. For example: by the commercial treaty with the United States of America, vessels built in the countries belonging to them are permitted to import goods of the growth and manufacture of the United States into Great Britain: but such vessels must be *owned* by the subjects of the United States. In the same manner, the 51 Geo. 3. c. 47. allows to Portuguese ships, owned by the subjects of the Portuguese government, the privilege of importing goods of the growth and manufacture of the dominions of the Crown of Portugal into Great Britain. These privileges, thus conceded to these States, are a dispensation of the rule in the third section of the navigation act. Now, it would seem at first view reasonable that British subjects might participate in a trade which the law allows to foreigners: but the law is otherwise, and the principle appears to be a sound one. It is quite manifest that an American or Portuguese ship would lose her privilege of importing goods into this country, if she were owned in *whole* or *part* by British subjects; the privilege being conceded only to ships of the built of the particular country, importing goods of the growth or manufacture of that country, and *owned by its subjects*. This was decided, in principle at least, in the case of *Campbell v. Innes*. (a) It was an action on a policy of insurance on a ship and cargo from Virginia to Great Britain. It appeared that the ship was *built* in America,

The importation of goods from America in a vessel, American built, when owned by British subjects,

(a) *Campbell and Others, Executors of Donaldson v. Innes*, 4 Barn. & Ald. 426.

but was the property of Messrs. Osborne and Co. who were British subjects, and by them was chartered for this voyage to one Donaldson, who was also a British subject. The cargo consisted of timber, the produce of the United States. Upon this it was objected, that the voyage was illegal, being in violation of the navigation laws. Abbott, C. J. was of this opinion on the trial at Guildhall, and directed a nonsuit. In the ensuing term a motion was made to enter a verdict for the plaintiff; and it was contended, that if this had been an American ship, and owned by Americans, the importation would clearly have been legal. For by 49 Geo. 3. c. 59. an importation of American goods in American vessels is permitted, on payment of the like duties, as if imported in ships not British built. This is in pursuance of the American treaty, and a dispensation of the navigation laws. Then the circumstance that this vessel is British owned cannot make a difference; for the case of *Long v. Duff* (a) shews that the policy of the legislature in such cases is not to prevent British subjects from employing foreign ships in neutral trade in as ample a manner as they can be employed by aliens. Abbott, C. J. I think the nonsuit right. The difficulty is this,—the importation is not legalized by 49 Geo. 3. c. 59., because that act is confined to ships American owned, and here the owners of this ship were British subjects. Nor can the importation be legal as being in a British ship, because the register acts prevent this vessel, which is American built, from being so considered. The case of *Long v. Duff* is very distinguishable. There the question turned on the words of the convoy act; and it was held that a foreign built ship, British owned, was not required to be registered. But that case contains no decision on the point, whether an importation of goods in a vessel of that description would, in a case like this, be legal.

is not legalized by 49 Geo. 3. c. 39.; and it is contrary to the navigation laws.

Campbell & Innes.

An information was filed by the Attorney General for the condemnation of a ship and her cargo, on the ground of an illicit importation of flax-seed, &c., from Russia. It appeared that she had been American property; had been purchased by a British subject in 1809; and from that period had made several voyages to this country; some voyages in the character of an American, and others under different flags; but she had not received, nor was she entitled to receive, (being foreign built) the character of a British ship by being registered as such. The point raised was, whether the vessel was protected under the 43 Geo. 3. c. 153. s. 4., which made it lawful, during the continuance of hostilities, for any per-

A privilege given by act of parliament to ships belonging to any state in amity with his Majesty, &c. does not extend to foreign-built ships British owned.

(a) 2 Bos. & Pul. 209. and see *ante*.

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son to import into the United Kingdom any sort of flax, or flax-seed, in any ship belonging to any kingdom or state in amity with his majesty, navigated by foreign seamen, from any port or place whatsoever, upon the same terms and conditions, &c. as if the same had been imported in foreign ships of the built of the country or place of which such flax or flax-seed was the growth, &c. notwithstanding the prohibition in the navigation act. Upon the part of the defendant it was contended, that although the vessel in question was confessedly a foreign ship, and not entitled, as such, to a British register, yet, inasmuch as she was the property of a British subject, a merchant residing in England, she was to be considered (if not within the letter, within the policy, of the statute) as belonging to a state in amity with his Majesty: and the case of *Pearce v. Cowie* (a) was cited, in which Gibbs, L. C. J. was reported to have ruled that a foreign-built ship, the property of a British subject, belonging to a state in amity with his Majesty, was within the meaning of the 43 Geo. 3. c. 163. s. 13. The defendant's counsel added that this decision had been followed up by a similar decision of Lord Ellenborough in a subsequent case on the same policy, (b) who was reported to have said, "It will be difficult to make me believe that a British subject is not a subject of a state in amity with his Majesty." They further pressed the improbability of its being the intention of the Legislature to afford a commercial advantage to a neutral state which it denied to its own subjects. They submitted, therefore, that in a case on the construction of a beneficial statute, passed in relaxation of a more rigorous law, for the purpose of granting privileges of commercial advantage to neutral ships; not for the benefit of the neutral, but of the British nation; the Court must, in a case of doubt, decide in favour of the British trade; that an alien ship, belonging to a British owner, was entitled to all the privileges conferred upon subjects of states in amity with his Majesty. On the other hand, the counsel for the crown objected to the case of *Pearce v. Cowie*, as a hasty *dictum* thrown out at *Nisi Prius*, without having undergone discussion, as it afterwards went off on another ground. (c) To shew that the Legislature had on many occasions observed a material distinction between the state itself and any other state in amity with it, (independently of the natural difference of the terms) they adverted to the various sections of the navigation act, and of the present statute, wherein that distinction was recognized, par-

(a) 4 Camp. N. P. 364.

(b) *Pearce v. Glover*.

(c) Holt's *Nisi Prius* Cases, p. 66.

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ticularly in the fifth section of the latter, which gives a privilege to import in ships built in, or belonging to Great Britain, or belonging to any state, &c. in amity with his Majesty. They contended, that a state in amity with his Majesty could not, by any construction, be made to mean any part of his Majesty's dominions; nor could a subject of his Majesty be the subject of a state in amity with his Majesty. The main object of a distinction taken between a British registered ship, and a ship foreign built, *British-owned*, is to encourage the former to the disadvantage of the latter. The Lord Chief Baron Thompson, in giving judgment, observed, that the terms 'ship or vessel, belonging to a kingdom or state in amity with his Majesty,' in their plain acceptation, necessarily referred to some kingdom or state whilst in a friendly relation to this country, and such a state as might hereafter become hostile to this kingdom, and not to the ships of individuals who compose part of the body of the subjects of this kingdom. Upon the whole, the court was of opinion, that a privilege given by act of Parliament to ships belonging to any state in amity with his Majesty, and manned with foreigners, to import merchandize otherwise prohibited, did not extend to foreign-built ships belonging to British subjects; the privilege being one *strictissimi juris*. (a)

Of foreign
ships, British
owned.

Indeed, it is the obvious policy of the navigation laws, and more especially of our registry acts, to encourage British ship-building, and British ownership, as the two chief instruments of maintaining and advancing our maritime interests. Having this object always in view, the Legislature, as far as it is possible, discourages and prevents the employment of British capital in all foreign shipping, and almost effectually compels our merchants to carry on all their export and import trade in ships of British built. The statute of 7 & 8 Will. excluded foreign built ships altogether from the plantation trade, and the 26 Geo. 3. c. 60., almost put an end to foreign ships, British-owned, by taking from them the privileges of a British ship; so that the trade of Great Britain after that act, with very few exceptions, was to be carried on in British-built ships equally with the plantation trade. The 34 Geo. 3. c. 68., completed what the previous statutes had begun. Hitherto the navigation system had confined all its restrictions upon shipping, whether British or foreign, to the importing of goods only, except in the plantation trade: but this latter statute enacted that no ship, registered or required to be registered as a British ship, should be permitted to export any articles whatsoever, unless

(a) Attorney-General v. Wilson, 3 Price's Ex. Rep. 431.

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owned.

manned with and navigated by a master, with three-fourths at least of the mariners British subjects. By this act, the exportation to foreign places in Asia, Africa, and America, must be made by the same sort of shipping and navigation as the importation hitherto had been. And, as respects the European trade, the registry acts have imposed the like restrictions. All articles of European trade, previous to these acts, such at least as were not included in the eighth section of the 12 Car. 2., might be imported in any ships, British or foreign, howsoever manned and navigated: but the 34 Geo. 3. c. 68., by enacting that no ship registered, or required to be registered as a British ship, shall import or export any articles whatsoever, unless navigated by a master, and three-fourths at least, of the mariners, British subjects, has put all imports in British ships under the same restrictions with those included in the eighth section of the navigation act, and has created a restriction as to exports which before was unknown, except in the plantations, where the whole trade, export as well as import, was originally confined to British-built ships, manned and navigated in this manner. The new registry act 4 Geo. 4. c. 41. follows in the same line of policy with the 26 & 34 Geo. 3.; for although it gives new facilities to the system of registry, it cautiously confines all the main privileges of British commerce to ships, British built, owned, and manned.

Of foreign-
built ships,
British owned,
in the East In-
dia trade.

IV. But foreign built ships, British owned, may still be employed by the East India company, during the continuance of their charter; such ships, however, must be built within some of the territories of the company, or in parts under the immediate protection of the British flag in the East Indies. These vessels must likewise be registered according to the forms prescribed by the 55 Geo. 3. c. 116., and are not suffered to trade beyond the limits of the company's charter. (a)

What is meant
by a vessel be-
ing of the
built of a fo-
reign country.

V. When the statutes speak of the *built* of a vessel, they are to be understood as using the term in its plain and natural sense. It was therefore determined by Lord Ellenborough, that a ship was not to be deemed of the built of Russia, within the meaning of the navigation act, which, having been originally constructed in another country, was wrecked on the coast of Russia, and repaired there at an expense of more than two-thirds of her value; although by the law of Russia she was, under these circumstances, treated

(a) 35 Geo. 3. c. 115., 42 Geo. 3. 4. c. 80. s. 20. The new registry act, c. 20. As to the employment of Asiatic sailors and Lascars, see 4 Geo. 4. c. 41. makes provision for ships to be registered in India.

as a Russian ship, had a Russian register, was owned by a Russian subject, and was navigated under the Russian flag. "Repair," says his Lordship, "is not built. A ship must be of the built of the place where she was originally constructed; and while her identity continues, it is impossible, in the nature of things, that the place of her built should ever be altered. The law of Russia cannot be of force to control the navigation act of Great Britain." (a) By the 26 Geo. 3. c. 60. a vessel was permitted to undergo repairs in a foreign port to the extent of fifteen shillings per ton. The new registry act extends this privilege to twenty shillings per ton. But the master on arrival at a British port is required to declare such repairs upon oath, to the collector or comptroller of the customs; and the necessity of such repairs must be proved to the satisfaction of the commissioners.

VI. No person, we have seen, (b) is entitled to be the owner, in whole or in part, of a British ship, required to be registered, who has not his usual residence in Great Britain, or in the dominions belonging to the crown. It has, therefore, been holden upon this clause of the act of 26 Geo. 3., that a person who is continually shifting his residence, so as not to have, under any extension, what can be deemed an usual residence *here*, does not come within this description of the statute. He must be, unless in the cases which are specified, usually resident in this country. (c) So also by s. 11. of the new registry act, no persons *usually* residing in any country not under the dominion of his Majesty can be the owner of a British ship. There is an exception indeed in favour of the members of British factories; and the agents for, or partners in, British houses.

Who may be the owner of a British ship.

VII. The most numerous cases, under the system of registry, are those which have arisen upon the provisions of the acts relating to the transfer of property in ships. Many of these cases will still continue to afford a rule for the direction of our courts, notwithstanding the repeal of the old registry acts. The three great provisions of the system are, first, that the party should have such a residence in the British dominions as would entitle him to a British register. He must not be a person coming occasionally, and for the purpose of obtaining a colourable domicile: secondly, that the ship shall not only be built, but, unless under circumstances of great emergency, repaired in the British dominions; and, thirdly, that there should always be a clear *constat* of the real ownership;

Cases and decisions upon the transfer of property in ships.

(a) *Redhead v. Cater*, 4 Camp. 188.

(b) 26 Geo. 3. c. 60. s. 8.

(c) 1 Edw. 148.

Cases and decisions upon the transfer of property in ships.

and therefore, if any transfer of the property take place, it must be publicly recorded, and the transfer indorsed on the certificate of register.

But a bill of sale from the original builder to the first purchaser of a new ship need not contain a recital of the certificate of registry; nor can properly do so, because the ship does not require to be registered till she is out of the hands of the builder, though the owners must cause her to be registered before the commencement of a voyage. (a)

Distinction between the acts of the public officers, and the parties to the transfer.

VIII. Through most of the forms of registry and transfer which are required by the statutes, there are two acting parties; the one, the parties in the registry, or contract; the other, the public officers. The equity of the Legislature does not hold the one responsible for the acts of the other. If the parties in the registry or contract have omitted any of the regular forms, the act is incomplete, and the contract is annulled as the penalty of their act of omission. But if the public officers have made such omission, the contract is not thereby vacated. The distinction is, that as respects the contracting parties, the statutes are imperative, but are directory only as respects the public officers. It has been holden, therefore, that the omission of the officer at the out-port to transmit a copy of the indorsement upon the certificate of registration to the custom-house in London does not invalidate a transfer. (b)

Of the indorsement on the certificate, under the 34 Geo. 3. c. 68.

IX. The 34 Geo. 3. c. 68. s. 15., which gives the form of an indorsement upon the alteration of property in a vessel, uses the expression "*all my, or our, right, share and interest.*" It would seem, therefore, as if by some oversight the framers of the act had neglected to provide for the case of a sale of a *part*. A question once arose upon this section; and it was contended that a transfer of any interest in a vessel would be defective, unless it stated that the interest transferred was the *whole* interest of the vendor. But the Court of Common Pleas decided, that upon the sale of any share, it was not necessary that the indorsement upon the certificate of registration should express the share to be *all* the vendor's interest; and that a person possessing a share in a vessel might sell or divest himself of any part, and still remain master of the residue. (c)

X. The provisions of these statutes are not confined to the transfer of property to a stranger, but apply also to a transfer by

(a) Abbott, 54.

187.

(b) Underwood v. Miller, 1 Taunt.

(c) *Ibid.* 387.

one part-owner to another. And where such a transfer was made whilst a ship was at sea, and the provisions were not complied with in the limited time after her return, the assignees of the party making it, who had become a bankrupt, were held entitled in a Court of equity to have an account of the voyage from the other part-owner. (a)

Cases and decisions upon the transfer of property in ships, under 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

Rolleston v. Hibbert.

XI. The first case decided on the 26 Geo. 3. was *Rolleston v. Hibbert*, (b) in which it was determined that an absolute bill of sale of a ship then at sea was void by 26 Geo. 3. c. 60. s. 17., unless the certificate of the registry were recited therein: therefore, although the vendee gave at the same time an undertaking to restore the ship on a future day on payment of a certain sum advanced by him on the credit of the security of the ship; and although the vendee had also the grand bill of sale, and had taken possession of the ship immediately on her arrival; it was, notwithstanding, held that he could not retain the ship, as having a lien on her, against the assignees of the vendor who became a bankrupt after the transfer. Previous to this statute, the delivery of the grand bill of sale of a ship at sea had been repeatedly held to be equivalent to the delivery of the ship itself, without any other superadded forms. (c) It was in the case of *Rolleston v. Hibbert* that Lord Kenyon said, that it was not necessary that the property in a ship should pass by a written instrument: but that if the parties chose to convey by a written instrument, they should not be permitted afterwards to refer to any other agreement. This opinion, so expressed, was the occasion of the clause in the 34 Geo. 3. c. 68. s. 14., that no transfer of property in any vessel should be valid unless made agreeably to the 26 Geo. 3. c. 60.; and by bill of sale, or instrument in writing. The 4 Geo. 4. c. 41. s. 29. requires the same formalities.

XII. But notwithstanding the seventeenth section of the 26 Geo. 3. c. 60. enacts that a bill of sale of a ship shall be absolutely void, unless the certificate of the registry be truly and accurately inserted therein, it has been determined, upon manifest principles of equity, that a mere clerical mistake shall not vitiate the bill of sale. (d) But the indorsements on the certificate of registry are not required to be recited in the deed of assignment of a ship; for the Legislature looks principally to the public interests in these acts, and not, in the first instance, to the purchaser. Now, as the

Clerical mistakes will not vitiate a bill of sale.

(a) *Speldt v. Lechmere*, 13 Vez. Jun. 508. and Abb. 55.

(b) 3 T. R. 406.

(c) *Atkinson v. Malling*, 2 T. R. 402.

(d) *Rolleston v. Smith*, 4 T. R. 161.

Cases and decisions upon the transfer of property in ships, under 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

The bill of sale is a nullity when the certificate of registry is not properly recited therein.

Law amended by 4 G. 4. s. 41. s. 29.

certificate of registry must be registered at the custom house, with the indorsements thereon, the owner cannot fail to be known; and as the purchaser must have the certificate of registry recited in the bill of sale, he will be directed thereby to resort to the custom house for any information which he may want. As the public, therefore, are sufficiently protected without any recital of the indorsements, it has been holden no good objection to a bill of sale of a ship that it did not recite them. It will, however, says a learned author, be always prudent, though it be not essentially necessary, to recite in a second, and every subsequent bill of sale, the indorsement made in pursuance of every previous transfer. (a) So, where the parties by mistake misrecited in a bill of sale the certificate of registry, by stating Guernsey as the port where the certificate was granted, instead of Weymouth, (which mistake was rectified when discovered, by consent of all parties, and the deed delivered *de novo*,) the Court of King's Bench held that no new stamp was necessary upon such re-execution; the deed taking no effect from its first delivery, and the defect arising not from intention but from mistake, and the alteration merely making the contract what it was originally intended to have been. (b) But where A. and B. were joint owners of a ship, and A. conveyed his moiety to B., but in the bill of sale the certificate of registry was not accurately and truly recited, the word *oath* being used instead of *affirmation*; *sworn*, instead of *affirmed*; the allegation that another part-owner was not resident within *twenty miles* being omitted, and the name of the *master* changed: under these circumstances, although B. took possession, and afterwards mortgaged the whole ship to A., (who did not take possession) and B. afterwards ordered C. to repair the ship, and then conveyed one half of the ship to A. and the other to D.; it was held that the first bill of sale was an absolute nullity, and that as the certificate of registry was not truly and accurately recited therein, (c) there was no legal transfer of the ship. The new act, 4 Geo. 4. c. 41. s. 29. has in this respect amended the law; though it might probably not have extended to the case under review.—It provides that no bill of sale shall be avoided by reason of any error in the recital, or by the recital of any former certificate of registry instead of the existing certificate, provided there be satisfactory proof of the identity of the ship.

(a) *Capadose v. Codnor*, 1 B. & P. 471.

483, and Abbott, 58.

(c) *Westerdell v. Dale*, 7 T. R.

(b) *Cole v. Parkin*, 12 East's Rep. 306.

XIII. It will be necessary in this place to state very concisely some of the decisions under the old registry acts. The 34 Geo. 3. c. 68. s. 16. requires that if a vessel be absent from the port to which she belongs when an alteration takes place in the property, the sale must be made as directed by the 26 Geo. 3. c. 60.; and within *ten* days after such ship shall return to the port to which she belongs, an indorsement must be made and signed by the owner, &c.; and a copy of such indorsement be delivered to the officer of the custom house authorized to make registries and grant certificates, otherwise the bill of sale, &c. is to be utterly void. The intent of this clause was to prevent an interest passing in ships from one person to another, until a record was made of the transaction at the custom house. It was, therefore, very early decided that the conditions of the act must be strictly complied with; and that where a bill of sale had been executed, and the requisites of the registry acts not completed until the rights of third persons intervened; no relation would hold good so as to make the conveyance effectual from any antecedent time. For if the act, it was said, were to be considered as giving an indefinite time for the compliance with its requisites, it would enable a transfer of property to be made to foreigners, who might remain concealed owners, and thereby defeat the material provisions of the statute. This was decided in *Moss v. Charnock*. (a) The facts of that case were shortly these: Kirkpatrick being indebted to the defendant in more than the value of his share of the ship, in August, 1800, made a bill of sale to the defendant, and sent it to him: but the defendant declined accepting it till the 15th of November, 1800; and on the 19th of that month Kirkpatrick became a bankrupt. On the 15th of December, and not *before*, the requisites of the 34 Geo. 3. c. 68. s. 16., in respect to the transfer of ships not in port, were complied with; and within ten days after the return of the ship to port an indorsement was regularly made on the certificate of the registry, and the other requisites of the act complied with. On the part of the plaintiffs it was contended that the requisites of the 34 Geo. 3. not having been satisfied before the bankruptcy, the sale was not complete at that time; in answer to which the defendant's counsel insisted, that as the requisites of the statute were complied with within a *reasonable* time after the execution of the bill of sale, that would by *relation* make the sale complete from the 15th of November, a period before the bankruptcy. The Court of King's Bench decided that the plaintiffs were entitled to recover, upon the ground

Cases and decisions upon the transfer of property in ships, under 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

Case of *Moss v. Charnock*.

(a) 2 East. 400.

Cases and decisions upon the transfer of property in ships, under 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

that Kirkpatrick having become a bankrupt between the time of executing the bill of sale to the defendant, and the time of the defendant's complying with the requisites of the registry acts, the property did not pass to him, notwithstanding such requisites were completed after the act of bankruptcy. Upon this case it is suggested, in a very learned Treatise, that Mr. Justice Lawrence, who delivered the judgment of the Court of King's Bench, must be understood to speak, (with reference to the facts of the case before the court,) of such requisites only as *may*, according to the circumstances of the transaction, be immediately complied with; and did not mean to intimate, that if Charnock had delivered a copy of his bill of sale to the officers before the bankruptcy of Kirkpatrick, so as to have enabled them to make the proper indorsement on the affidavit, he would not thereby have acquired an *inchoate* title, which might have been perfected by the indorsement made on the certificate within ten days after the ship's return. (a)

XIV. The case of *Moss v. Charnock* has been much questioned. In *Mestaer v. Gillespie*, (b) the Lord Chancellor observed, that the generality of the proposition stated by a very able judge, in *Moss v. Charnock*, excited a doubt in his mind, whether what was there laid down must not be qualified.—“The proposition (he says) as stated in that judgment, goes to this extent, that if a man sold a ship at sea, the vendee having done every thing required by the act which could be done; but afterwards, before the arrival of the ship in port, an act of bankruptcy was committed by the vendor; the assignee under a commission of bankruptcy, and not the vendee, would take the ship.” Mr. Baron Wood in another case expressly (c) dissented from the doctrine laid down in *Moss v. Charnock*; and, speaking of the provision in 26 Geo. 3. c. 66. s. 16. said,—“No time is here limited within which the copy of the indorsement shall be delivered; and, therefore, I take it the inference of the law is, that it shall be done within a reasonable time; and until that time is elapsed, I hold the bill of sale remains good, and the property legally transferred to the vendee.” And, again, “It has been contended, that no property passes from the vendor to the vendee till all these things have been done; and the case of *Moss v. Charnock* has been cited to prove that position; and it has been said, that if an act of bankruptcy intervenes before the delivery, although the delivery be within a reasonable time

Authority of *Moss v. Charnock* disputed.

(a) Abbott 60.

(b) 11 Vesey, jun. 637.

(c) *Hubbard v. Johnstone*, 3 Taunt.

207.

afterwards, the vendee loses the ship. With great deference to that authority, I cannot agree to it; I think that the property passes *instantly by the bill of sale*, and that the subsequent acts to be done are not necessary to transfer the property, but that the grant is defeasible by subsequent omissions, in cases where it is so expressly provided, but not otherwise." In a subsequent case, *Palmer v. Moxon*, (a) Lord Ellenborough, in commenting on the Case of *Moss v. Charnock*, says, "I confess that I have always thought that the things required to be done by the act were in their nature conditions subsequent. What is required to be done within ten days must undoubtedly be *done* within ten days: but where no time is limited, the act must be done within a reasonable time." And, Bayley, J. said—"I think the case of *Moss v. Charnock* was rightly decided under the circumstances; for there the bill of sale was executed on the 23d of August, and the requisites of the statute were not complied with until the 5th of December; so that there was *gross delay*. The true construction of these acts seems to be this, that the bill of sale shall be holden to transfer the property from the time of its execution, but shall be liable to become void, *ex post facto*; that is, if the party does not comply with the requisitions of the statute within a reasonable time; upon the failure of which the statute makes the sale null and void."

XV. The case of *Palmer v. Moxon* was as follows:—The plaintiffs had recovered a judgment against one Moody for 237*l.*; and a writ was delivered to the defendant, the sheriff, on the 11th of June, 1812, at a quarter past twelve o'clock in the afternoon. The sheriff's officer, about half-past three o'clock in the same afternoon, took possession of one-fourth part of the brig *Thirsk*, then lying in the port of Hull, being the port to which she belonged, and in which she was registered. It appeared that on the 10th of June, the day previous to the levy, Moody, being owner of one-fourth, Duckles of another fourth, and Matthias Moody and Thomas Duckles of another fourth part, by a bill of sale of that day, in consideration of the sum of 910*l.*, sold to A., B., and C., &c., three full and undivided fourth parts of the brig. A copy of the certificate of the registry was set forth in the bill of sale, which was executed on the day of its date by J. and M. Moody and T. Duckles, about five o'clock in the afternoon; and at the same time a memorandum of the transfer by all the *four* was indorsed on the certificate of the registry, and was signed by the *three*; but neither the bill of sale nor the memorandum of transfer was

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Principle of the case of *Moss v. Charnock* limited in *Palmer v. Moxon*, 2 M. & S. 43.

Palmer v. Moxon.

Cases and decisions upon the transfer of property in ships, under 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

Palmer v. Moxon.

signed or executed by R. Duckles, until the 15th of June following. On the 11th of June, at a quarter before two in the afternoon, a true copy of the memorandum so indorsed on the certificate of registry, and signed by the three, was left with the proper officer of the custom-house, at Hull, to be entered; and on the 15th of June another copy of the memorandum, with the signatures of the four, was also left with the proper officer for the same purpose. The sheriff's officer, as above stated, made his levy at half-past three in the afternoon of the 11th of June: but the sheriff, on being ruled, returned *nulla bona*, and an action being brought against him for a false return, the Court of King's Bench were of opinion that he acted properly in abandoning the brig; and that the requisites of the registry act were complied with within a reasonable time. Lord Ellenborough in this case observed—"That a reasonable time was capable of being ascertained by evidence; and, when ascertained, is as fixed and certain as if fixed by act of parliament. In this case, all that was required to be done by the parties to the transfer was done by three of the four, one of them being the person whose share was in question; and what was done by them was done, as near as may be, *instantly*; a copy of the indorsement was left with the officer the next day after executing the bill of sale and signing the indorsement; but it appears that one of the parties did not execute until afterwards, but still, when he executed, he did it within a reasonable time, and all was perfected before the return of the writ." (a)

XVI. The case of *Moss v. Charnock*, rightly limited, is not therefore at variance with *Palmer v. Moxon*; at the same time, as regards the obligation to comply with the requisites of the registry act, the rule seems to be that which has been laid down by Mr. Baron Wood, in *Hubbard v. Johnstone*, with some slight addition from the late judgment in *Palmer v. Moxon*; namely, that the forms of the registry acts, which the law requires to constitute a perfect title to a ship, are in their nature conditions subsequent; that the property of a ship vests in the purchaser from the time of the execution of the bill of sale, not from the time of his compliance with the registry act: but that the transfer is liable to become void, *ex post facto*, if the forms of the registry acts, as prescribed by law, are not observed within a reasonable time, or, where a fixed time is expressly limited, (for example, ten days) *within* that time. In other words, that the efficient act is the bill of sale: but

Forms of the registry acts are in the nature of a condition subsequent.

(a) 2 Maule and Selwyn, 50.

that the statutes make the sale absolutely void, unless the requisites are complied with, within such a time as the act *expressly* requires, where it makes time a constituent of title; or within such period as may be deemed reasonable under the circumstances of the case, where the time is left indefinite.

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But an indorsement on the transfer of a ship in the same port, made upon the certificate of registry, and bearing date at the time of the transfer, but not signed by the vendor till three years after the certificate had been delivered up and cancelled, and had remained dormant all the intermediate time, was held not to convey a title under the 15 sect. of 34 Geo. 3. c. 68. For the object of the register acts, said the court, in requiring an indorsement on the certificate, is in order to notify the change of property to the public; and therefore such indorsement must be made upon an existing acknowledged certificate in use at the time. (a)

Moss v. Mills, 6 East. 144.

XVII. Upon the sale of a ship at sea it was much questioned, under the former register acts, whether the purchaser, having omitted to comply with some of the forms of the acts, could not make a title to the ship *per saltum*, by getting her registered *de novo* in another port where he resided at the time of the purchase, pursuant to the 7 and 8 Will. 3. This point was first raised in *Heath v. Hubbard*, which gave occasion to several other cases, and produced a very elaborate investigation of the registry acts by all the judges in Westminster Hall. (b) The case was this:—Ward was sole owner of the *Fishburn*, belonging to the port of Newcastle upon Tyne. On her outward voyage she was put under an embargo by the Emperor of Russia, in the spring of 1801. By bill of sale dated March 7, 1801, but executed on the 11th of April, Ward assigned to the plaintiff *Heath* twenty-sixtieth parts of the ship, in trust for certain underwriters. On the 14th of September following, *Heath* transmitted to the custom-house at Newcastle a copy of his bill of sale; and the officer caused an entry to be indorsed upon the affidavit on which the original certificate of registry had been obtained, and made the usual memorandum in the book of registers in that port: but no notice was given to the commissioners of customs till the 24th of January following. On the 9th of November, 1801, Ward, by a regular bill of sale, assigned the *whole* of the ship to the defendant *Hubbard*, who then resided in London; and on the 2d of January, 1802, registered

Heath v. Hubbard, 4 East. 110.

(a) *Moss v. Mills*, 6 East. 144. In this case the certificate had been cancelled and delivered up on the vendee's obtaining a register *de novo*, (issued

without authority) reciting the cancellation of the former certificate.

(b) 4 East. 110.

Cases and decisions upon the transfer of property in ships, under 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

the same ship *de novo* in the port of London. At the time of the assignment by Ward to the defendant, the grand bill of sale of the whole ship was delivered to him, and on the 19th day of February he sold the whole of the ship by public auction. It appeared that the ship had never been in the port of Newcastle since she had cleared outwards: but, the embargo being taken off, she returned to Plymouth after the execution of the bill of sale by Ward to the plaintiff. But before the execution of the bill of sale by Ward to the defendant, she sailed again, and was absent at the time of its execution. It was not till her return, of which the plaintiff had no knowledge, that the defendant obtained the new register; but no transfer of property appeared in any document at the custom-house at Newcastle subsequent to the entry on the 14th of September, 1801, and no indorsement of the transfer of one-third of the ship to the plaintiff was ever made on the original certificate of the ship's registry. Heath brought an action of trover against Hubbard, to recover one-third part of the ship, and the Court of King's Bench gave judgment for the plaintiff; being of opinion that he had complied with all the requisites of the statute, the ship not having returned to Newcastle, and had acquired a property under the bill of sale. They likewise thought that the bill of sale to Hubbard was void, on the ground of his omission to send a copy to the custom-house, at Newcastle.

XVIII. The next action connected with the above case was an action of trover brought by the assignees of Ward against the same defendant, to recover the remaining three-fourths of the same ship. All the facts of the case were again considered by the court; and they determined that, under all the register acts, 7 & 8 Will. 3. c. 22. s. 21.; 26 Geo. 3. c. 60. s. 3, 4, 5, 16.; and 34 Geo. 3. c. 68. s. 15, 16, in order to make a title to a ship sold at sea, whether in whole or in part, such sale must be acknowledged by indorsement of the certificate of registry in the manner therein described; and a copy of such indorsement be delivered by the vendee to the persons authorized to make registry (which officers are directed to make an entry thereof, to be indorsed on the affidavit upon which the original certificate of registry was obtained, and to make a memorandum in the book of registers, and to give notice to the commissioners of customs,) and that it was not sufficient for the vendee to register such ship *de novo* in another port where he resided, though he had removed the ship thither, and though she had never returned to her original port after the sale. (a)

Bloxham v. Hubbard, 5 East. 407.

(a) Bloxham v. Hubbard, 5 East. 407.

By reason, however, of some defect in their own title, as assignees, (a) the plaintiffs did not recover the whole property in the ship which they claimed. Another action was therefore brought against Hubbard, and the Court of King's Bench again gave judgment for the plaintiff. The facts of the case were, upon this occasion, put into a special verdict, and the cause was carried to the Exchequer Chamber by writ of error, and in that Court the *judgment of the King's Bench was reversed* by the opinion of five Judges against two. The majority of the Judges decided, that if a ship, registered at one port, be transferred, whilst at sea, to a purchaser residing at another port in this kingdom, the proper mode of perfecting a transfer within the requisitions of the registry acts was by a registration *de novo* in her *new port*; and that it was not necessary for the ship to return to her port in order to have a memorandum of the transfer indorsed on her certificate of registration; nor was it necessary for the purchaser to send a copy of the bill of sale to the ship's former port, nor to indorse a memorandum of the transfer on her certificate of registry within ten days after the ship's return to England. (b) They likewise decided, that the 34 Geo. 3. c. 68. s. 16. applied to the sale of an entire ship in the same port, as well as to the sale of a share or shares therein; and Mr. J. Heath and Mr. Baron Wood were likewise of opinion, that the register acts, so far as they applied to defeat titles, and to create forfeitures, were to be construed strictly, as penal, and not liberally, as remedial laws. (c).

Cases and decisions upon the transfer of property in ships, under 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

Hubbard v. Johnstone, 3 Taunt. 177.

XIX. Subsequent to the case of *Hubbard v. Johnstone*, the Court of King's Bench has often had occasion to put a construction upon the clauses of the registry acts, (26 Geo. 3. c. 60. s. 16. and 34 Geo. 3. c. 68. s. 15. and 16.) which require a record to be made at the custom-house, and on the certificate of registry, of all sales and transfers of ships, whether such ships be in their home ports, or absent at sea, at the time of such sales. The court has, in a certain degree, qualified its original judgment in *Hubbard v. Johnstone*: but it has at the same time uniformly decided, that the transfer of a ship, *whilst at sea*, to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of

(a) Abbott 63.

(b) This was decided by five Judges against two.

(c) *Hubbard v. Johnstone*, 3 Taunt. 177. Pending this proceeding in the Exchequer Chamber, the effect of a new register obtained in a port to which a ship had been transferred was

again brought under the consideration of the K. B.; and it was again decided, that such new register alone was not a sufficient compliance with the statutes of registry; the Court thereby confirming their former judgment in *Bloxham v. Hubbard*. *Hayton v. Jackson*, 8 East. 511.

Cases and decisions upon the transfer of property in ships, under 26 Geo. 3 c. 60. and 34 Geo. 3. c. 68.

sale are delivered to the custom-house officers in that port, within a reasonable time after the sale. (a) But the courts have taken a distinction, obvious indeed upon the face of the registry acts, between the sale of a ship in her home port, and the sale of a ship when absent at sea. Thus, where a ship registered at the port of N. was transferred by a deed of assignment to owners resident in L., the ship being then in the port of L.; they have decided, that this transfer was not within 34 Geo. 3. c. 68. s. 15., but within sect. 16. of that act; and that the transfer was valid, although no indorsement was made on the certificate of registry. (b)

Formerly much confusion arose in the construction of the clauses of the registry acts, with respect to the time allowed to make an indorsement upon the certificate of the registry, upon the sale of a vessel, under the different circumstances in which she might be placed; that is to say, whether in her original port of registry at the time of the sale, in another port in the same kingdom, or absent at sea. The 26 Geo. 3. c. 60. s. 15. appears to relate only to the transfer of ships in the same port to which the ship belongs; and it does not avoid a contract for non-compliance with the formalities prescribed in that section; nor does it appoint any time, but such reasonable time as the law intends, for making an indorsement of transfer upon the certificate of registry. The 34 Geo. 3. c. 60. is the first statute which avoids the conveyance of ships, if made contrary to the forms prescribed by that act. By sect. 15. a certain form of indorsement is required upon the change of property in vessels in the port to which they belong: but no specific time is prescribed. The Courts, therefore, have merely required that such indorsement should be made in a reasonable time. By sect. 16., if a transfer of property be made in vessels, absent at the time from the port to which they belong, *ten* days is allowed, after such ship shall return to such port to which she belongs, for making the proper indorsement upon her certificate of register. But when a vessel registered at one port was transferred by bill of sale to owners resident in another port, the ship being at the time of transfer at such other port, the transfer has very justly been considered valid, without making any other indorsement on the ship's certificate of register than what is required by the ordinary provisions of the registry acts.

(a) *Moss v. Charnock*, 3 Taunt. 177. *Palmer v. Moxon*, 2 East. 399. *Dixon v. Ewart*, 3 Merivale, 322. *Richardson v. Campbell*, 5 Barn. and Ald. 198.

(b) *Hodgson v. Brown*, 2 Barn. and

Ald. p. 427. In this case it is to be observed that the ship never did return to her port of N., so that there was no opportunity of complying with the requisites of 34 Geo. 3. c. 68.

XX. The new act 4 Geo. 4. c. 41. has removed all difficulty in the above cases, and laid down a plain and obvious mode of proceeding with respect to all vessels, in whatsoever condition they may be. (a) The 35th section declares that no bill of sale shall be effectual until produced to the officers of customs, and entered in the book of registry according to a form given by the act; and such bill of sale is to be valid to pass the property thereby intended to be transferred, except as against such subsequent purchasers and mortgagees, who shall first procure the indorsement to be made upon the certificate of registry of such ship in section 35. mentioned.

Cases and decisions upon the transfer of property in ships, under 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

XXI. By section 37. it is then enacted, that when the particulars of any bill of sale, or other instrument, by which any ship, or any share or shares thereof, shall be transferred, shall have been entered in the book of registry as directed by section 35, the collector and comptroller shall not enter in the book of registry the particulars of *any other bill* of sale, or instrument, purporting to be a transfer by the same vendor or mortgagor, or vendors or mortgagors, of the same ship or vessel, share or shares thereof, to any other person or persons, unless *thirty days* shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry. Or in case the ship or vessel was absent from the port to which she belonged at the time when the particulars of such former bill of sale, or other instrument, were entered in the book of registry, then unless *thirty days* shall have elapsed from the day on which the ship or vessel arrived at the port to which the same belonged; and in case the particulars of two or more such bills of sale or other instruments as aforesaid, shall at any time have been entered in the book of registry of the said ship or vessel, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale, or other instrument as aforesaid, unless *thirty days* shall in like manner have elapsed from the day on which the particulars of the last of such bills of sale, or other instrument, were entered in the books of registry, or from the day on which the ship or vessel arrived at the port to which she belonged, in case of her absence as aforesaid. And in every case where there shall at any time happen to be two or more transfers by the same owner or owners of the same property, in any ship or vessel entered in the book of registry as aforesaid, the collector and comptroller are required to indorse upon the certificate of re-

Of the sale and transfer of ships, by 4 Geo. 4. c. 41. s. 37, 38, 39, 40, 41, 42.

(a) The cases under the old registry acts are now of little value; but it will be necessary to touch upon them slightly in the present Treatise, in order to shew the improvements made by the late act.

Of the sale and transfer of ships, by 4 Geo. 4. c. 21. s. 39. et seq.

gistry of such ship or vessel the particulars of that bill of sale, or other instrument, under which the person or persons claims or claim property; who shall produce the certificate of registry for that purpose *within thirty days* next after the entry of his said bill of sale, or other instrument, in the book of registry as aforesaid, or within *thirty days* next after the return of the said ship or vessel to the port to which she belongs, in case of her absence at the time of such entry as aforesaid; and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector and comptroller to indorse upon the certificate of registry the particulars of the bill of sale, or other instrument, to such person or persons as shall first produce the certificate of registry for that purpose; *it being the true intent and meaning of this act that the several purchasers and mortgagees of such ship or vessel; share or shares thereof, when more than one appear to claim the same property, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale, or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid.*

When certificate is lost, registry *de novo* is allowed.

XXII. The next section then provides, that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, so that the indorsement cannot, in *due time*, be made thereon, and proof thereof shall be made by the purchaser or mortgagee, or his known agent, to the satisfaction of the commissioners of his Majesty's customs, it shall be lawful for the said commissioners to grant such further time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said ship or vessel, under the provisions of this act; and thereupon the collector and comptroller shall make a memorandum in the book of registers of the further time so granted; and, during such time, no other bill of sale shall be entered for the transfer of the same ship or vessel, or for the same share or shares thereof. And by the 38th section it is further enacted, that if the certificate of registry of such ship or vessel shall be produced to the collector and comptroller of any port where she may then be, after any such bill of sale shall have been recorded at the port to which she belongs, together with such bill of sale, containing a notification of such record, signed by the collector and comptroller of such port as before directed, it shall be lawful for the collector and comptroller of such other port, to indorse on such certificate of registry, being required so to do, the

transfer mentioned in such bill of sale; and such collector and comptroller shall give notice thereof to the collector and comptroller of the port to which such ship or vessel belongs, who shall record the same in like manner as if they had made such indorsement themselves, but inserting the name of the port to which such indorsement was made; provided, that the collector and comptroller of such other port shall first give notice to the collector and comptroller of the port to which such ship or vessel belongs, of such requisition made to them, to indorse the certificate of registry; and the collector and comptroller of the port to which such ship or vessel belongs shall thereupon send information to the collector and comptroller of such other port, whether any and what other bill or bills of sale have been recorded in the book of the registry of such ship or vessel; and the collector and comptroller of such other port, having such information, shall proceed in manner directed by this act, in all respects, to the indorsing of the certificate of registry, as they would do if such port were the port to which such vessel belonged.

Of the sale and transfer of ships, by 4 Geo. 4. c. 21. s. 39. *et seq.*

XXIII. The next section (39) goes on to enact, that if it shall become necessary to register any ship or vessel *de novo*, and any share or shares of such ship or vessel shall have been sold since she was last registered, and the transfer of such share or shares shall not have been recorded and indorsed in manner in section 35. directed, the bill of sale thereof shall be produced to the collector and comptroller of his Majesty's customs, who are to make registry of such ship or vessel; otherwise such sale shall not be noticed in such registry *de novo*, except as hereinafter excepted; provided, that upon the future production of such bill of sale, and of the existing certificate of registry, such transfer shall and may be recorded or indorsed, as well after such registry *de novo*, as before. The following section then proceeds to enact that if, upon any change of property in any ship or vessel, the owner or owners shall desire to have the same registered *de novo*, although not required by this act, and the owner, or proper number of owners, shall attend at the custom house at the port to which such ship or vessel belongs for that purpose, it shall be lawful for the collector and comptroller of his Majesty's customs at such port, to make registry *de novo* of such ship or vessel at the same port, and to grant a certificate thereof, the several requisites hereinbefore in this act mentioned and directed being first duly observed.

XXIV. The next section, 42 provides for the sale of vessels, in the absence of the owners, without the formal powers;—it enacts, that if the ship, or the share of any owner who may be out of the king-

Of the sale of
ships in the
absence of
owners.
4 Geo. 4. c. 41.
s. 42.

dom, shall be sold in his absence by his known agent or correspondent, under his directions, either expressed or implied, and acting for his interest in that behalf, and such agent or correspondent who shall have executed a bill of sale to the purchaser of the whole of such ship or vessel, or of any share or shares thereof, shall not have received a *legal* power to execute the same, it shall be lawful for the commissioners of his Majesty's customs, upon application made to them, and proof to their satisfaction of the fair dealings of the parties, to permit such transfer to be registered, if registry *de novo* be necessary, or to be recorded and indorsed, as the case may be, in manner directed by this act, as if such legal power had been produced; and if it shall happen that any bill of sale cannot be produced, or if, by reason of distance of time or the absence or death of parties concerned, it cannot be proved that a bill of sale for any share or shares in any ship or vessel had been executed, and registry *de novo* of such ship or vessel shall have become necessary, it shall be lawful for the commissioners of customs, upon proof to their satisfaction of the fair dealings of the parties, to permit such ship or vessel to be registered *de novo*, in like manner as if a bill of sale for the transfer of such share or shares had been produced; provided, that in any of the cases herein mentioned good and sufficient security shall be given to produce a legal power or bill of sale, within a reasonable time, or to abide the future claims of the absent owner, his heirs and successors, as the case may be; and at the future request of the party whose property has been so transferred, without the production of a bill of sale from him, or from his lawful attorney, such bond shall be available for the protection of his interest, in addition to any powers or rights which he may have in law or equity against the ship or vessel, or against the parties concerned, until he shall have received full indemnity for any loss or injury sustained by him.

Such are the provisions of the new registry act as to the transfer of ships, and the duties of buyers and sellers. They adapt themselves to all the circumstances in which the ship, or the vendor or vendee of the ship, can possibly be placed. It is but faint praise to say of them, that they are at once clear, comprehensive, and judicious; and admirably suited to the exigences of navigation and commerce.

XXV. We now pass to the consideration of another branch of our subject. In the construction of the registry acts, it was decided in the very first cases which came before the court, that the obvious policy of these statutes, as well as their plain and natural meaning, precluded all equitable titles to British ships, and regarded no

No equitable
interest in
British ships.

other property than such as was *strictly legal* according to the requisites of the acts. The 4 Geo. 4. c. 41. makes no alteration in this respect. Thus, in *Rolleston v. Hibbert*, already cited, the Court of Chancery concurred with the Court of King's Bench in deciding, that a bill of sale of a ship at sea, (void by the omission to recite the certificate of registry) intended as security for the payment of a note, could not be enforced by the vendee's retaining the ship, as having a lien on her, against the assignees of the vendor, who became a bankrupt after the transfer; and the Lord Chancellor thought that the register acts were equally binding in a court of equity as in a court of law, and refused to compel the vendor to make a legal conveyance to the purchaser. (a)

No equitable interest in British ships.

Rolleston v. Hibbert.

XXVI. No inchoate or fiduciary title, therefore, can be sustained in opposition to the words of the statute, which expressly declare that no contract or agreement for an interest in ships shall be of any avail for any purpose whatever, either in *law or equity*, unless a bill of sale, &c. is executed according to the prescribed regulations. The case of a mortgage of a ship will be considered hereafter, as it stands on peculiar circumstances; being a title both equitable and legal. In the case of the *New Draper*, the learned Judge of the Admiralty Court, in a cause of possession, decreed that the master should be dispossessed of a ship, who set up a virtual title to a majority of interest, on the ground of an *agreement*. In giving judgment Lord Stowell observed: "Independent of any other objection, I do not think that under the act of parliament it would be possible for the court to recognize such a transaction; for the words of the act are as strong as they can be." (b) And in another case, where the legal title remained in A., who was in possession of a bill of sale, the court sustained that title in opposition to an asserted equitable interest; "for this court," said the same learned judge, "is bound down to decide on the legal title, without taking notice of equitable claims." (c) So, likewise, in the case of *Brewster v. Clarke*, in the Court of Chancery, a bill was filed for a specific performance of an agreement to purchase a ship, of which the plaintiffs were joint-owners. The ship had been put up to sale by public auction, at which the defendant, Clarke, having agreed to become the purchaser, paid the deposit, and executed a memorandum of sale, reciting that the ship had been duly registered; and a copy of the certificate of registry was actually annexed to the memorandum. The answer, (admitting that the defendant was in possession under this agreement,) raised objections to his title under the registry acts, viz. that the certificate

The New Draper.

The Sisters.

Brewster v. Clarke.

(a) *Rolleston v. Hibbert*, 3 T. R. 400. and 3 Bro. Ch. Ca. 571. (b) 4 Rob. 291.

(c) *Sisters*, 5 Rob. 155.

Cases and decisions upon the transfer of property in ships, under the registry acts, 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

No equitable interest in British ships.

Camden v. Anderson.

Assignment of freight alone not within the registry acts.

of registry was not duly recited in the memorandum, or instrument of sale, according to the 26 Geo. 3. and 34 Geo. 3. The Lord Chancellor refused the motion, stating that the policy of these acts prevented a court from looking on any one who had *not strictly* complied with their provisions in the light of a purchaser. (a)

Indeed, if an equitable interest could prevail in contradistinction to a legal interest, it would tend to defeat all the salutary policy of these acts; (b) and though an equitable interest may, in many instances, be protected by an insurance, the Court of King's Bench refused to sustain such an interest in a ship, though in an action upon a policy on freight. Therefore, where two partners purchased a ship under a bill of sale, conformably with the registry act, and afterwards took in two other partners, but there was no transfer of the ship to them jointly with the others, they held that the four partners had not any insurable interest in the freight. For they considered the right to freight as resulting from the right of ownership, and that these partners had neither a legal nor an equitable title to the vessel. (c) But it is clear that if, previously to these acts of parliament, a partnership of four had bought a ship in the name of one or two of them, or in that of a stranger advancing them money, they would in equity have been the owners of that ship, and might have recovered in a policy of insurance upon her.

XXVII. It is not, however, to be inferred from the above case, that the property in the ship, and the property in the freight, are governed by the same principles; the property in the freight may be distinct from that in the ship, and the interest in the ship may be in one, and the freight in another. An assignment of the freight alone is not within the registry acts, and does not require any of its forms. (d) But where A., B., and C., agreed to purchase a ship, and that it should be registered in the names of A. and B. only, but the profits of the ship to be divided amongst the three, and C. filed a bill against A. and B., for an account of the freight and earnings of the ship, on a general demurrer, the Vice-Chancellor held that agreement to be illegal. "No doubt," he said,

(a) *Brewster and Others v. Clarke and Others*, 2 Merivalc, 75. See also *Biddell v. Leader*; in which case it was decided, that an executory agreement to transfer a share of a ship was void, for not containing the recital of the certificate of registry.—*Barn. and Cress*. 320.

(b) 4 *Robinson*, 291.

(c) *Camden v. Anderson*, 5 T. R. 709. See likewise *Stringer v. Murray*, 2 Barn. & Ald. 248. *Post*.

(d) *Mestaer v. Gillespie*, 11 Ves. 636. As to an assignment of freight, see *Robinson v. Macdonnell*, 3 Maul. and Selw. 228. No freight can be assigned, which is not in existence at the time, either actually, or potentially.

"a title to freight may be acquired by assignment : but this is an agreement that three shall buy a ship, and that it shall be registered in the name of two only, and that the three shall share the profits of the ship. The case is new. My opinion is, that, on grounds of public policy, such an agreement cannot be permitted. It is a stipulation contrived for the purpose of escaping from the provisions of the registry acts." (a)

Cases and decisions upon the transfer of property in ships, under the registry acts, 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

XXVIII. A case under very similar circumstances to *Camden v. Anderson* came before the Lord Chancellor in a case of bankruptcy, when his Lordship, reviewing and confirming the previous cases in courts of law, decided, that ships purchased by one partner in the name of the one partner only, who became a bankrupt, and was the sole registered owner, were to be considered separate property as between the joint creditors of the bankrupt and his deceased partner in trade. In this case his Lordship observed, that where the interest in a ship is derived under a party's own act and contract, not executed according to the registry acts, it cannot be reformed in equity, any more than an annuity deed, not pursuing the forms of the annuity act. "The case," he said, "requires this ; that if a man enters into a partnership, where one of the articles is a ship, there must be a *new* registry." (b)

Of ships purchased by a partner, under the old registry acts.

XXIX. About six years after the decision in the above case, the registry acts, and their operation upon property, both equitable and legal, were again brought before the attention of Lord Eldon, in *ex parte Yallop*. (c) Since the new act, 4 Geo. 4. c. 41., the facts of this case are not so important : but the observations of the Lord Chancellor, as they apply to the system of registry *generally*, are worthy of particular attention. Lord Eldon, in giving judgment, observed, that a decision that the interest in a ship should be taken as joint property, (the case then before the court) if the question arose in a contest between the partners themselves, would destroy the whole effects of the registry acts. "These acts," he added, "were drawn upon the policy, that it was for the public interest to receive evidence of the title to a ship from her origin to the moment in which you look back to her history ; how far throughout her existence she has been British-built, and British-owned ; and it is obvious that if, where the title arises by act of the parties, the doctrine of implied trust in this court is to be supported, the whole policy of these acts may be defeated ; as neutrals may have interests in a ship, partly British-owned ; and the means of enforcing the navigation laws depend upon knowing

Ex parte Yallop.

(a) *Battersby v. Smith*, 3 Madd. 114.

(b) *Ex parte Yallop*, 15 Ves. 60.

Cases and decisions upon the transfer of property in ships, under the registry acts, 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

Ex parte
Yallop.

Difference between a title to a ship by contract of parties, and operation of law.

from time to time who are the owners, and whether the ship is British-owned and British-built. Upon that the Legislature will not be content with any other evidence than the registry; and requires the great variety of things prescribed by these acts. *They go so far as to declare, that notwithstanding any transfer, any sale, or any contract, if the purpose is not executed in the mode and form prescribed by the act, it shall be void to all intents and purposes.* The consequence, established by positive and repeated decisions, is, that upon a contract for the purchase of a ship, which it may be supposed might have been executed without public mischief, though by force of that contract, and by operation of law, the purchaser would be the owner in equity from the moment of the purchase, and the vendor from that moment would be divested from all interest,—yet it is decided that these acts are so imperative that if they rest upon the contract, it cannot be said of a ship, as of an estate, that by operation of law, and by force of the contract, the ownership is changed; and if the money had been paid, the decision would be upon the same principle; and it must be recovered by another form of proceeding.” But his Lordship in another place observed, that there is a wide difference between the title set up under the contract of the parties, and under the operation of law, or the act of God; and that is authorized by a fair construction of the act of parliament. Speaking of transfers, his Lordship said; “The act could not be intended to apply to transfers that could not be carried through in the mode and by the means prescribed: the transfer, for instance, from a testator to his executors; or the transfer to assignees, in bankruptcy. The next of kin, or residuary legatees, take by operation of law, not under a contract for transfer, capable of being carried into execution in the modes prescribed. A transfer of that description, therefore, is not that species of transfer, the regulation of which was in the contemplation of the Legislature: but if the transfer is of that species which was the subject of regulation, the Legislature expects obedience from all parties contending for interests and title under such acts of transfer. The argument of the joint creditors must go to this extent, that if these partners had not purchased this interest in the ship in the name of one of themselves, a circumstance not material, but a stranger had made the purchase, advancing the money of the partners, and they had permitted the bill of sale to be made in his name, he swearing that he was the sole owner, and the registry being made by him as such,—as the partnership advanced the money, therefore, notwithstanding all this parliamentary regulation, upon principles of public policy, with re-

gard to the mode in which, for the benefit of the public, that property was to be acquired, they are to be considered the owners; as if the subject of the contract had been an estate. That is directly inconsistent with the act of parliament; that, if it could prevail, instead of securing the evidence which the public was intended to have, how far the ship, through every period of her existence, was British-owned and British-built, it would be the easiest thing to cover the ownership of neutrals and enemies, without a possibility of detection by means of the act; which was intended to furnish decisive and incontrovertible evidence of those facts." His Lordship concluded by stating,—“ Upon the first question made by this petition; whether by the manner in which this ship was dealt with, it is partnership property? My opinion is, that no such dealing in the partnership could possibly make it partnership property, as between the partners; as that would be a direct infringement of the act of parliament. A distinct question is, whether, though it cannot be so taken as between the partners themselves, the ship, if dealt with in that manner, ought not, upon the statute of King James, to be considered as partnership property; whether it was so held, that the joint creditors can say it was partnership property before the bankruptcy; or, on the other hand, the title being of a public registered nature, that public registry must not decide, as among all mankind, where the property is? My opinion is, that the registry is the evidence of the property; and must be taken to be the evidence of it, even among the creditors. Upon every ground, therefore, this petition must be dismissed.” (a)

XXX. The new registry act has made an important amendment in the laws with respect to the interest which partnerships and joint stock companies may now hold in ships, or shares of ships, and the manner in which such interest is to be described; and has, therein, laid down a new rule for the guidance of courts of justice, when any cases shall occur under the circumstances of those which we have cited. It is enacted by s. 30. that it shall be lawful for any number of owners *named and described in the registry*, being partners in any house or copartnership, actually carrying on trade in any part of his Majesty's dominions, to hold any ship or vessel, or any share or shares of any ship or vessel, in the name of such house or copartnership *as joint owners* thereof, without distinguishing the proportionate interest of each of such owners; and that such ship or vessel, or the share or shares thereof so held in copartnership,

(a) *Ex parte* Yallop, 15 Vesey, 60. 251. and Abbott, 73.
See likewise *ex parte* Gribble, 17 Ves.

Cases and decisions upon the transfer of property in ships, under the registry acts, 26 Geo. 3. c. 60. and 24 Geo. 3. c. 68.

Ex parte
Yallop.

As to partnership property in ships, by 4 Geo. 4. c. 41. s. 30.

All the partners' names must be inserted in the registry.

Partnership property in ships, by 4 Geo. 4. c. 41. s. 30. to be governed by the same rules as all other partnership property.

No more than thirty-two persons entitled to be legal owners at any one time, 4 Geo. 4. c. 41. s. 31.

Any number of persons, associated as a joint stock company, may own any number of vessels, three of the members of such company taking the prescribed oath, and registering the vessel or vessels, according to a given form.

shall be deemed and taken to be *partnership property* to all intents and purposes, and shall be governed by the same rules, both in law and equity, as relate to and govern *all other* partnership property in any other goods, chattels, and effects whatsoever. But the next clause proceeds to enact, that no greater number than *thirty-two persons* shall be entitled to be the legal owners at one and the same time of any ship or vessel, as tenants in common, or to be registered as such. But it is provided that this clause shall not affect the equitable title of minors, heirs, legatees, creditors, or others, *exceeding that number*, duly represented by, or holding from, any of the persons, within the said number, registered as legal owners of any share or shares of a ship or vessel. It is also provided, in favour of the more extensive employment of capital in shipping, and to encourage large investments in this valuable property, that as often as it shall be proved, to the satisfaction of the commissioners of customs, that *any number* of persons have associated themselves as a *joint stock company for the purpose of owning any ship or vessel, or any number of ships or vessels, as the joint property of such company*, and that such company have duly elected or appointed any number, not less than *three*, of the members of the same to be trustees of the property in such ship or vessel, or ships or vessels, so owned by such company, it shall be lawful for such trustees, or any *three of them*, with the permission of such commissioners, to take the oath required by this act before registry be made; except that, instead of stating therein the names and descriptions of the other owners, they shall state the name and description of the company to which such ship or vessel, or ships or vessels, shall in such manner belong; provided also, that if it shall become necessary to register any ship or vessel, or ships or vessels, belonging to any corporate body in the United Kingdom, the oath required by this act to be taken before registry be made shall be taken by the secretary or other proper officer of such corporate body, who shall in such oath declare the name and description of such corporate body, instead of the names and description of the owners of such ship or vessel.

XXXI. It is needless to enlarge upon the sound policy of the sections of the new registry act above cited. Many doubts and difficulties, and it may be added, much injustice, which occurred under the old registry acts, will be got rid of by this alteration of the law.

XXXII. The next class of cases relates to the mortgage of ships, in regard to which a very important alteration has been made by the new act 4 Geo. 4. c. 41. ss. 43 and 44. But under this head it will be necessary shortly to consider the former decisions.

It being the obvious intent of the registry acts, that no one

should have the property, and the use, of the ship, whose name might not be discovered by reference to some public document, the courts have never suffered a trust of a ship to prevail under any colour whatever, whether in the nature of lien or deposit. Therefore, where the owner of a vessel, upon receiving a loan of 200*l.*, deposited her in the hands of a broker, and executed a bill of sale to him, wherein was an indorsement, *that the assignment was made as a lien or security for the loan on the vessel, and that the broker should immediately sell and execute a lawful bill of sale of her to the purchaser, and, after retaining the loan, commission, and charges, pay the surplus to the owner*, but the requisites of the registry acts were not pursued; the Court of Common Pleas held, that this did not constitute a lien, but a mortgage, and was therefore void under the registry acts; and that the broker could not retain the vessel until the payment of the loan. (a) Notwithstanding the above case, it is not to be concluded, that there could be no valid mortgage of a ship, and that the owner could not make any transfer of the property without parting entirely and irredeemably with all his interest. The mortgage of a ship under the former registry acts, like the mortgage of any other chattel, might take place, subject to the restrictions laid down in courts of law and equity relative to such mortgages. The main and fundamental principle as respects property in shipping is this,—that there can be no valid mortgage without complying with all the forms of the register acts. But if these forms are complied with, the mortgage of a ship, whether at sea or in port, will be sustained as a valid security. Before the registry acts, ships were constantly mortgaged; and the free transfer of property in shipping, as in other subjects of trade and commerce, encouraged. These acts were intended for the benefit of commerce, and not meant to deprive the owners of their former right of raising money by mortgage.

XXXIII. In the case of *Thompson v. Smith*, (a) the Vice Chancellor, Sir T. Plumer, commenting upon an observation which had been thrown out at the bar, that since the registry acts an agreement to reconvey a vessel, pledged for a debt, was merely honorary, and that there could be no mortgage of a ship, is reported to have said, “Such a proposition, publicly stated, calls for immediate reprobation; and is totally without foundation. The acts only meant to confine the ownership of ships to British subjects, and were not intended to have any effect upon the right of mortgaging. A transfer by mortgage, *made known to the public, and confined to British subjects*, is within the spirit of the acts; nor is there any thing in

Cases and decisions upon the transfer of property in ships, under the registry acts, 26 Geo. 3. c. 60. and 34 G. 3. c. 68.

Wilson v. Heather, 5 Taunt. 642.

A mortgage of a ship valid under 26 Geo. 3. and 34 Geo. 3., if the forms of the registry acts be complied with.

Thompson v. Smith, 1 Madd. 399.

(a) *Wilson v. Heather*, 5 Taunt. 642.

(b) 1 Madd. 399.

When mortgages on ships, are valid, &c.

the letter to confine the transfer to an absolute sale. Ever since the passing of the 7th and 8th William, and the more recent statutes, it appears, from many cases in law and equity, to have been admitted that a ship may be mortgaged, and no doubt has ever been suggested on the subject. (a) In *Hibbert v. Rolleston*, and *Mestaer v. Gillespie*, there were mortgages of the ship, and no objection made on that account. In the late case of *Wilson v. Heather*, (b) in the Common Pleas, the court considered the mortgage of a ship as valid, provided the forms required by the registry acts are attended to. Indeed, the terms of the statute plainly shew that there may be an equitable title in a ship, for the terms '*contract and agreement*' will obviously embrace such a title. The act says, (c) '*No transfer, contract, or agreement for transfer, of any property in a ship, shall be valid and effectual, either in law or in equity, unless such transfer, contract, or agreement, &c. shall be made by bill of sale or instrument in writing, containing such recitals as the clause prescribes. To say, therefore, that there cannot be an equitable title in a ship is to contradict the words of the act.*'

Of the mortgage of ships under the former acts.

XXXIV. It must be admitted, however, that the form of indorsement on the change of property in a vessel, under the old register acts, was adapted only to a total and absolute sale, and did not apply to a transfer by mortgage; the mortgagor not being properly within the term "seller" nor could he truly declare (as the form of sale requires,) that he had *sold* all his interest, &c. in the ship; nor was the mortgagee properly a purchaser. At the Custom House the officers would not permit any entry but according to this prescribed form; the former statutes not having provided for a deviation from it in any case, nor allowing any sale to be valid without strict observance of it. The consequence was, that where a ship was mortgaged, the practice had usually been to have two instruments; one, an absolute conveyance of the ship; the other, a deed of defeasance; the *former only* being registered at the Custom House. Consequently, in such a case, a difficulty arose in enforcing in a court of justice the mortgagor's right of redemption by setting up the unregistered deed in opposition to the registered title; and from this circumstance the notion arose that, since the register acts 26 Geo. 3. and 34 Geo. 3. no transfer of property in

(a) In *King v. King*, 3 P. W. 360. mention is made of a decree of Lord Harcourt, on the mortgage of a ship at sea, which ship was taken, and the executors of the mortgagor were de-

creed to pay the money for which ship was mortgaged.

(b) See *ante*.

(c) 34 Geo. 3. c. 66. s. 14.

ship could be made, except by way of absolute sale; and, consequently, that no valid mortgage could be made since those acts. But this course of reasoning was founded on mistake.

XXXV. The new registry act expressly permits the mortgage of vessels, or shares of vessels. It provides, moreover, that the mortgagee shall not be exposed to the liabilities of an owner; and it gives new facilities to a mortgagor, and stronger securities to a mortgagee, than the courts allowed them to possess under the former acts, and, indeed, by the general law of the land. It is enacted by the forty-third section of the new act, that when any transfer of any ship, or of any share thereof, shall be made only as a security for the payment of a debt, either by way of mortgage or of assignment to a trustee, for the purpose of selling the same for the payment of any debt, then and in every such case the collector and comptroller of the port, where the ship is registered, shall in the entry in the book of registry, and also in the indorsement on the certificate of registry, in the manner directed by the act, state and express that such transfer was made *only as a security* for the payment of a debt, or by *way of mortgage*, or to that effect; and the person to whom such transfer shall be made, or any other person claiming under him as a mortgagee, or a trustee only, shall not by reason thereof be *deemed to be the owner of such ship or share thereof*; nor shall the person making such transfer, be deemed, by reason thereof, *to have ceased to be an owner* of such ship, any more than if no such transfer had been made; except so far as may be necessary for the purpose of rendering the ship or share so transferred available by sale, or otherwise, for the payment of the debt, for securing the payment of which such transfer shall have been made.

Of the mortgage of ships under 4 Geo. 4. c. 41. ss. 42, 43, 44.

Mortgagee not to be deemed an owner by reason of his mortgage.

XXXVI. The next section is more important, and disposes of a great variety of cases which occurred under the old law. It enacts that when any transfer of any ship, or of any share thereof, shall have been made as a security for the payment of any debt, either by way of mortgage, or of assignment, and such transfer shall have been duly registered according to the provisions of the act, the right or interest of the mortgagee or other assignee, shall not be in any manner affected by any *act or acts of bankruptcy committed by such mortgagor or assignor, mortgagors or assignors, after the time when such mortgage or assignment shall have been so registered as aforesaid; notwithstanding such mortgagor or assignor, mortgagors or assignors, at the time he or they shall so become bankrupt as aforesaid, shall have in his or their possession, order, and disposition, and shall be the reputed owner or owners of the*

The transfer of ships, for the security of debts, being duly registered, the rights of the mortgagee are not to be affected by any act of bankruptcy of the mortgagor, under the statute of 21 Jac. 1. c. 19. s. 11. as to reputed ownership.

said ship or vessel, or the share or shares thereof, so by him or them mortgaged or assigned as aforesaid; but that such mortgage or other assignment shall take place of and be preferred to any right, claim, or interest, which may belong to the assignee or assignees of such bankrupt or bankrupts in such ship or vessel, share or shares thereof, any law or statute to the contrary thereof notwithstanding.

Where the forms of the registry acts are not complied with, no relief in courts of equity, on the ground of accident or fraud.

Newnham v. Graves,
1 Madd. 399.

XXXVII. Under the former register acts, the courts of equity jealously watched over their execution, and invariably refused relief, on the alleged ground of accident and fraud, where the forms of registration were either evaded or omitted. The cases under this head are not wholly superseded by the new act. It becomes therefore necessary to state them concisely; and then to point out the alterations and amendments which are introduced by 4 Geo. 4. c. 41. Two cases occurred before the late Master of the Rolls; (a) *Newnham v. Graves*, and *Barker v. Chapman*. In the former case, the circumstances were as follows: (b)—On the 23d of April, 1808, Dawson and his partner, for a valuable consideration, assigned to Bland and his partner a ship, called the *Venus*, by a proper bill of sale. The vessel was then at sea. A copy of the bill of sale, with notice, was duly sent to the commissioners of the customs, according to the act 34 Geo. 3. c. 68. In May, 1808, Bland and Co. became bankrupts, and the plaintiffs were appointed assignees. In the same month Dawson and Co. became bankrupts, and Graves and another were chosen assignees. On the 31st of July, 1808, the vessel arrived in London, to which port she belonged. The plaintiffs immediately took actual possession, and applied to the captain for the certificate of the registry, to get it indorsed within the ten days after the arrival of the ship, as required by the act: but the captain, in collusion with the assignees of Dawson, delivered it to them; and it was admitted that application had been made to the assignees of Dawson to direct the captain to deliver the certificate within ten days, and that they refused to do so, conceiving that they were not bound to do any act to assist the plaintiffs in making perfect their title. *The Master of the Rolls* was of opinion that the registry act precluded the court from giving any relief; and dismissed the bill, but without costs. In *Barker v. Chapman and Others*, assignees of Robson, it appeared that on the

Barker v. Chapman,
1 Madd. 399.

(a) Sir William Grant.

(b) *Newnham and Others*, assignees of Bland and Others, *v. Graves* and

Another, assignees of Dawson and Another, 1 Madd. 399. *in note*.

2d of March, 1812, the bankrupt Robson had executed a bill of sale of the ship *Bacchus* to the plaintiff, and made an indorsement on the registry in the presence of two witnesses, and sent the instrument to the broker: but, from inadvertence or design, the witnesses had not signed the attestation, and it was sent back to Robson to get the proper attestation; but he detained the same till he became bankrupt, and the assignees refused to deliver up the bill of sale. The Master of the Rolls dismissed the bill, so far as related to the ship *Bacchus*, but without costs. So, likewise, in another case, Sir Thomas Plumer decided in conformity with the above cases, that if on the sale of a ship there was no bill of sale or indorsement on the certificate, no relief could be given in equity on the ground of accident and fraud. In this case, that learned Judge observed, that in *Barker v. Chapman*, just cited, there was gross fraud in preventing the ship's register from being indorsed, within the time prescribed by the act, after the ship's return to her port. "And yet," he adds, "the Master of the Rolls, Sir William Grant, with much reluctance, and after a year's delay of his judgment, in hope that the parties would compromise, decided that he could not relieve. In that case there was no appeal. It is, therefore, an express determination that fraud is not relievable in these cases." (a)

Barker v. Chapman,
1 Madd. 399.

Thompson v. Leake,
1 Madd. 39.

XXXVIII. The Courts, however, under the old registry acts, have not so rigidly insisted upon these requisites, as to suffer them to supersede plain and obvious rights, which only wanted something of their formal completion. Therefore, where a power of attorney was given to sign an indorsement on a certificate, the Lord Chancellor decided, that it was not revoked by the bankruptcy of the vendor, subsequent to the execution of the power, but previous to the indorsement. His Lordship considered it as a power to execute only a mere formal act, which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy; and he decided that an indorsement on the certificate, made within ten days, by virtue of such a power of attorney, (the grantor of which had since become a bankrupt) was a sufficient compliance with the registry acts. (b)

Dixon v. Ewart,
3 Merivale 322.

XXXIX. The case to which we have referred is more important upon another consideration, as the Lord Chancellor therein confirms the judgment of the Court of King's Bench in *Palmer v.*

Case of Palmer v. Moxon reviewed, and the principle confirmed by

(a) *Thompson v. Leake and Others*, Sugden, 5th edition, p. 700. *Ex parte* 1 Madd. 39. But where there is direct Wright, 1 Rose, 308.
fraud, it is said equity will relieve. (b) *Dixon v. Ewart*, 3 Merivale, 322.

the Lord Chancellor, 3 Meriv. 322.

Dixon v. Ewart.

No bill lies to compel the execution of an indorsement on a ship's certificate of registry after the time given by the statute. But *semble*, that equity will afford relief by compelling the execution of the formalities of the register

Moxon; (a) and, in conformity with that decision, and the previous case of Hubbard v. Johnstone, (b) decided, that a bill of sale passed the absolute property of a ship at sea, subject only to be divested in case the indorsement on the certificate of registry were not made within ten days after the ship's return to port. The Lord Chancellor's judgment in this case cannot, with any propriety, be omitted. The facts of the case are not important: but, in adverting to the arguments at the bar, his Lordship says, "I am glad to have been referred to the case of Palmer v. Moxon; for I thought something had been said on this subject in the courts of law, since Moss v. Charnock, upon which I formerly observed in Mestaer v. Gillespie. (c) It strikes me very forcibly that the principle must be similar to that of the cases under the annuity act, (d) by which it has been decided that the grant of the annuity passes the ownership instantly, subject to be divested in case of noncompliance with the provisions of the act by enrolment within the twenty days thereby limited. And this appears to be Lord Ellenborough's opinion in Palmer v. Moxon; for I cannot think that the decision of the Court of King's Bench in that case can be satisfactorily accounted for by the doctrine of relation. The ship might have been taken in execution within the ten days: but the property must be in actual possession when execution is executed; and, therefore, if the property were not passed by the bill of sale, there could be no valid execution. There is no doubt that there can be no such thing as an equitable title to a ship; and the case before the Vice-Chancellor (e) is, as to this, also very material. When the former act (f) passed, there was not sufficient attention paid in framing its enactments to what might be its effect upon the principles adopted in courts of equity; and it was to remedy that deficiency that the last act was introduced, (g) by which it is now completely established that there can be no such thing as the equitable ownership of a ship. I well know that a bill does not lie to compel the execution of the indorsement after the ten days are expired: but, if it were possible for the plaintiff to bring his case before the court, within the time limited;—would the court refuse to entertain it? Or, if the Legislature had given twelve months instead of ten days,—would the court refuse to aid the party in such a case by the exercise of its

(a) See *ante*.

(b) See *ante*.

(c) 11 Vez. 637.

(d) 17 Geo. 3. c. 26

(e) Thompson v. Smith, 1 Madd. 395.

(f) 26 Geo. 3. c. 60.

(g) 34 Geo. 3. c. 68.

jurisdiction to compel the specific performance of an agreement? I cannot imagine that the Legislature meant to declare, that there may be a sale of a ship at sea, but that there shall be no means, either at law or in equity, of compelling the execution of those formalities which it has directed to accompany the transfer: (a) The Legislature could not have meant to deny to the suitor, in such a case, the advantage of equitable relief. Its meaning must have been, to give the party an inchoate right to the property which is the subject of the assignment." His Lordship subsequently observed,—“When this case was before me, I considered that there are some important points of law which will be involved in its decision; and resolved, before I did any thing further, to have the opinion of some other judges upon these questions. I have since received from Lord Chief Justice Abbott, now on the Circuit, a note, containing the opinion of himself and the Lord Chief Justice of the Common Pleas, (Sir Vicary Gibbs) which is, in substance,—That the transfer of a ship at sea, if all the requisites of the registry acts have been duly complied with at the time of the transfer, vests the property in the vendee, subject only to be divested, upon the neglect of the vendor to make the indorsement on the certificate of registry within the ten days after the return of the ship into port. That, if a bankruptcy intervene before the arrival of the ship, the indorsement being only an act of duty on the part of the vendor, and passing no interest, may be performed by the bankrupt himself. And that, (as in this case) if the vendor have given a power of attorney to perform this act of duty previous to the bankruptcy, his attorney may carry it into effect, notwithstanding the act of bankruptcy has intermediately occurred. This is the opinion which these judges have given; and on the authority of their communication I shall act as if it were the settled law of the case, which, indeed, upon looking into the acts of Parliament, and considering the opinion delivered to me, I think that it is.”

XL. But if the forms of registration be not complied with, however peculiar the circumstances of the case may be as between the parties themselves, the law will not relieve them. Therefore, where A., having contracted for a ship to be built for him in the East Indies, agreed, during the time of its building, to sell a share to B.; and B. paid a part of the price in pursuance of the agreement; and afterwards, on the ship's arrival in England, A. caused

acts, where there is an inchoate title in the vendee; if he apply within the proper time (where the time is fixed by law) or, within a reasonable time, where it is left indefinite. See *vide* the time allowed by the new registry act, 4 Geo. 4. c. 41. ss. 36 & 37. and the consequences of delay.

(a) See the case of *Mestaer v. Gillespie*, 11 Vez. Jun. 621, and the cases commented upon in Abbott, p. 77.

her to be registered, and accounted with B. as part-owner; but B.'s share was never on the register as part owner; the Court of King's Bench decreed that B. had no legal interest in the ship. (a)

Of the alterations in the system of registry, under 4 Geo. 4. c. 41.

XLII. We have given the above cases, as being the more recent decisions of the courts under the former registry acts 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68. The new act 4 Geo. 4. c. 41. has introduced a most important amendment in the laws of registry, in most of the particulars upon which these cases turned. It requires indeed, as an indispensable condition, that all transfers of ships, or any interests therein, shall be by bill of sale or other instrument in writing. 2. That such bill of sale, &c. should recite the certificate of registry. In these two circumstances, the new act is in perfect agreement with the former registry acts. But it adds this important proviso (b) that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship, intended to be conveyed, be effectually proved. The clause in the 34 Geo. 3. c. 68. s. 14. had always been strictly construed; and many contracts, which were brought into discussion in the courts, had been pronounced invalid, from the omission to recite the certificate of registry in the bill of sale. The necessity of reciting the certificate of registry in the bill of sale was founded upon public policy; (c) and this principle is effectually guarded in the new act. But the substantial justice of a contract is also protected, by declaring that it shall not be invalidated by error or mistake in the recital of the certificate.

Of the recital of the certificate of register in the bill of sale.

XLIII. We have before stated the important amendments which the new registry act has introduced with respect to the transfer of vessels and the indorsements upon the certificate, both as to the time and the manner in which they

(a) *Stringer v. Murray*, 2 Barn. & Ald. 248. And see *Camden v. Anderson*, 5 T. R. 709. *Curtis v. Parry*, 6 Vesey Jun. 739. *Macster v. Gillespie*, 11 Vesey, 621. These are express authorities to shew that the register is conclusive evidence of the legal title, where the ship has once passed by bill of sale; and that the ownership must be evidenced by the register, and the register alone. See

ex parte Yallop, 15 Ves. 60.

(b) See *ante*, 4 Geo. 4. c. 41. s. 29.

(c) *Biddell v. Leeder*, 1 Barn. & Cress. p. 327. In this case it was decided that an executory agreement to transfer a share of a vessel is void by the 34 Geo. 3. c. 68. s. 14., for not containing a recital of the certificate of registry. See this case, *ante*.

me to be made. A sufficient but defined time is allowed for all indorsements on the certificate, under whatever condition the vessel may be at the time of sale: but the transfer is not rendered null and void by the omission to make the indorsement within the time allowed, as it was under the 34 Geo. 3. c. 68. s. 16. The consequence of permitting the given time, (namely, thirty days) to elapse, is, that the purchaser, though his contract be prior in point of time, will incur the hazard of being postponed to a purchaser who has used due diligence. The intent of the act being expressed to be, that the several purchasers or mortgagees shall have priority one over the other, not according to the respective times when the particulars of the bill of sale (by which the transfer is made) is entered in the book of registry, but according to the time when the indorsement is made upon the certificate of registry. This clause will at once secure all that notoriety of transfers which the policy of the registry acts requires, and will at the same time prevent the many hardships which occurred under the former acts. We thus see that there things are necessary to secure the title of the purchaser of a ship,—

1. A bill of sale in writing.
2. The production of such bill of sale to the officers of the customs, and the recording of it in the book of registry.
3. An indorsement on the certificate of registry within thirty days, if the ship be sold in her home port; and within the same period of time after her *return* to her home port, if she be sold when absent from such port; but the penalty upon the omission of this latter formality on the part of the purchaser is not, as we have seen, to avoid his contract, but to postpone his title to that of intermediate purchasers.

Transfer not null and void by omission to make the indorsement on the certificate, 4 Geo. 4. c. 41. within thirty days.

XLIII. It will be necessary in all cases on the registry acts, to observe the distinction, that trusts implied, or arising by operation of law, are not within the meaning of the statute. The registry acts are imperative upon voluntary contracts between party and party only: but are not so upon transfers which are made by the act of the law, or by causes independent of the immediate will of the parties. Thus, assignments by commissioners of bankrupts to assignees under the bankrupt laws, and titles passing to executors and administrators, in case of death, are not that species of transfer the regulation of which was in the contemplation of the Legislature. (a) With respect to executors, administrators, or next of kin, the immediate point has never, we believe, come before the court: but in the case of Blox-

The registry acts are imperative only upon the voluntary transfer of parties, not on titles arising by operation of law.

(a) 6 Vez. Jan. 739. 15 Vez. Jun. 68.

ham v. Hubbard the Court of King's Bench had no difficulty in deciding that these acts had no application to cases of transfer by operation of law, such as from the commissioners to the assignees of a bankrupt trader. (a)

Notwithstanding the bill of sale of a ship may be void, a party may have a remedy on a collateral covenant contained in the same instrument.

Kerrison v. Cole, 8 East. 231.

Mestaer v. Atkins, 5 Taunt. 381.

XLIV. We have already had occasion to observe, that an assignment of freight was not within the provision of these statutes; and that although the bill of sale of a ship might be void by a neglect of the proper forms of these acts, a contract for freight, or an assignment of freight, might be valid and capable of being enforced in law or equity. And it would, we apprehend, make no difference whether the assignment of freight were contained in the same instrument, which was void as to the ship, or in a different instrument. (b) A point, which resembles in substance the case above put, has been decided in the Court of King's Bench. The decision of the court was, that though a bill of sale for transferring the property in a ship, by way of mortgage, might be void as such, for the omission of reciting the certificate of registry therein, yet the mortgagor might be sued upon his personal covenant, contained in the *same* instrument, for the repayment of the money lent. (c) In giving judgment in this case, Lawrence, J. observes, "that the object of the act will be very sufficiently answered, if we hold it to make void so much only of the instrument as is meant to convey the property in the ships. The object of the Legislature was, that it should be made appear who were the real owners of British ships, in order to prevent any transfer of them to foreigners, who might navigate them under the privileges of the British flag. That will effectually be done by saying that the transfer shall be void if the requisites be not complied with, without avoiding a collateral covenant for the payment of money contained in the same deed by which the ships were intended to be mortgaged. And this construction is according to the rule of the common law, as laid down by Hutton, J., in *Ley's Rep.* 79. that when a good thing and a void thing are put together in the same grant, the common law makes such a construction that the grant shall be good for that which is good, and void for that which is void." So, likewise, it has been determined that the ship registry acts do not prevent a person having a lien upon papers deposited with him belonging to a ship which he is commissioned to sell. (d)

(a) 5 East. 407.—*Sed vide* the new act, 4 Geo. 4. c. 41.

(b) *Spledtt v. Lechmere*, 13 Vez. Jun. 582.

(c) *Kerrison v. Cole*, 8 East. 231.

(d) *Mestaer v. Atkins*, 5 Taunt. 381. In this case it is clear that the custody of the papers gave the party detain-

XLV. Many cases, under the former acts have arisen as to the operation of the statutes of bankruptcy, where the possession, order, and disposition of the ship, have been left with the vendor, but the vendee has complied with all the requisites of the acts, and become the registered owner. The cases upon this head, which are not very important since the late act, will be considered in the second part of this Treatise. It is manifest, however, from all the cases, that where the title of a ship comes strictly and properly in question, no claim can be received in opposition to the modes of conveyance required by the law. The statutes of bankruptcy, particularly the 21 Jac., which are directed against the false appearances of property, and which are meant to punish those who enable the trader to procure for himself a delusive credit by a reputed ownership, were held not to be at all affected by the former registry acts. The registry acts relate only to the formalities of title as between the parties contracting and the public: but they do not interfere with the operation of any other statutes which are enacted to prevent false credit, and which, by assuming the possession, order, and controul of property, as the *indicia* of right, deal with it as belonging to the bankrupt in whose disposition they find it, though the legal ownership and title may, in fact, be in another. In the cases under the act of 21 Jac. there are always two parties, the *real* owner and the *apparent* owner; and the real owner is punished for the fictitious semblance of property which he enables the apparent owner to hold out. This branch of our subject does not fall under our present enquiry: but the cases under it will be of little use since the 43d section in 4 Geo. 4. c. 41.

The former registry acts did not affect the statutes of bankruptcy as to reputed ownership.

XLVI. There are cases, however, independent of the bankrupt laws, in which the possession of a ship has been deemed sufficient evidence to maintain an action, though the legal title may be in another. Thus, in *Robertson v. French*, (a) which was an action on a policy of insurance, the Court of King's Bench determined that the property of a ship might be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts. They likewise held that such parol evidence of ownership, arising from possession at a particular period, was not disproved by shewing a prior register in the name of another, and a subsequent register to the same person. And in another case, in

Robertson v. French, 4 East. 130.

ing them no power over the ship. He could not send her to sea, or sell her, by the possession of the papers *alone*. (a) 4 East. 130.

Sutton v. Buck,
2 Taunt. 302.

the Court of Common Pleas, (a) it was decided that where the plaintiff bought and paid for a ship stranded on the English coast, but had no regular conveyance of her, and the defendant possessed himself of parts of the wreck, which drifted on his farm, that the plaintiff's possession enabled him to recover for them in an action of tort. The Court being of opinion that the possession of a ship under a transfer, void for non-compliance with the register acts, was a sufficient title in trover against a stranger for parts of a ship being wrecked, Lawrence, J. in this case observed, "That there was enough of property in the plaintiff to enable him to maintain trover against a wrong-doer; and although it has been urged that the contract is void with respect to the rights of third persons, as well as between the parties, yet, as far as regards the possession, it is good as against all but the vendor himself."

Of the evidence
afforded by the
registry acts.

XLVII. It was formerly the practice to produce, at trials at Nisi Prius, the register-book of shipping, from the custom-house, as evidence of the title, both to establish an ownership on the part of the plaintiff, and to charge the defendant, if a ship-owner, with the property in the vessel. This evidence was, for a long time, received without discussion or objection. But in the case of *Fraser v. Hopkins*, (b) when this question was brought before the Court of Common Pleas, they held that the register alone did not furnish even *prima facie* evidence to charge a person as owner of a ship in a suit between private individuals. Such a use of the register was certainly not in the contemplation of the Legislature; and it is perhaps possible, though not likely to occur, that the name of a person may be introduced into the book of registers without his assent. Therefore, in a subsequent case, the Court of King's Bench determined that proof of the execution of a bill of sale of a ship to the defendant was not evidence to charge him, as an owner, with stores furnished to the ship, without shewing his assent to such sale. And they likewise determined that the register of a ship, naming a person as a part-owner, made by, and upon the oaths of others, was not even *prima facie* evidence to charge him as owner, without his assent or adoption. (c) "For not-

(a) *Sutton v. Buck*, 2 Taunt. 302.
See also, to the same effect, *Prouting v. Hammond*, 8 Taunt. 688.; and *Dixon v. Hammond*, 2 Barn. and Ald. 846.

(b) 2 Taunt. 5.

(c) *Tinkler v. Walpole*, 14 East. 226. and see *Phillips on Evidence*, tit. *Ships' Registry*, Vol. 1. and 2.; where this subject is examined with the usual ability and perspicuity of the writer.

withstanding," said Lord Ellenborough, "the practice may have prevailed for a long time, to receive ship's registers as evidence of the property being in the persons therein named; yet, when we are brought to consider the admissibility of such evidence against the defendant, in a case where he has done no act to adopt the register as having been made by his authority, we cannot give effect to it, without saying that a party may have a burthensome charge thrown upon him by the act of a third person, without his own assent or privity. If it had appeared that the defendant by any act of his own had recognized the register, he would have been liable to all the consequences as a part-owner, which it describes him to be: but here he has done no act to adopt it. His partner has, indeed, dealt with the property as if the defendant were a part-owner, by registering the ship in his name: but the act of a third person, without some act of the defendant to recognize it, cannot throw upon him a burthen, without violating the plain rule of law." Mr. Justice Bayley said,—“Before the first register act passed, there must have been other media of proof to charge a party as owner of a ship; and the object of that act was not to create evidence to charge any person named as owner, but that no person should have the benefit of the British navigation without registering his ship in the manner prescribed. It would be very unjust, in many cases, if a person could be charged as a part-owner, with the expenses of the ship, by having his name inserted in the register, without his knowledge. It would often be converted into an engine of fraud; for if the owners were not in good circumstances, it would be easy to introduce another name of a solvent man into the register, in order to procure credit; and then, if that were evidence against him, he would be liable to be sued;—and how could he be prepared to negative the evidence, if he knew nothing of the fact of such a register? The other owners named would be made parties to the action, so that he could not call them to disprove the fact.”

XLVIII. Upon the same principle, a register is not of itself evidence of a jointownership, in support of the defendant's plea, that other persons there named are jointly liable with him; (a) nor is it evidence that the ship is British-built, as there described. (b) So, in an action brought by the plaintiff, as agent, on a policy of insurance, the register is not evidence to prove an averment that the interest in the ship is in the persons there described. (c) The Legis-

(a) *Flower v. Young*, 3 Campb. 475.

240.

(c) *Pirie v. Anderson*, 4 Taunt.

(b) *Reusse v. Meyers*, 3 Campb. 652.

Of the evidence
afforded by the
registry acts.

Register and
certificate of
registry con-
clusive evi-
dence of want
of title against
those not
named therein.

Mac Iver v.
Humble, 16
East. 169.

lature has made the registration necessary to perfect a title: but this does not make it of itself proof of the title. Property in a ship is to be proved now as it was proved before the acts of parliament relating to registers; as, for example, by proving actual possession in the party, or in those to whom he has committed it, or in those from whom he has himself derived his title. Any one of these media of proof, (accompanied by the evidence of the registry, in order to make the other evidence admissible,) will be sufficient. But the register and certificate of registry are conclusive evidence of want of title against those who are not named in the register. Thus, in an action on a policy of insurance on freight, where the interest in a ship and its earnings were alleged to be in four persons, who were partners in trade, two only of whom were named as owners in the register, it was decided that the action could not be maintained, although it was proved as a fact, that the ship had been paid for by the four partners; for, as the plaintiffs claimed the freight only in right of ownership, they could not recover without proving that right; and it appeared conclusively from the register that all the four partners had not legal title to the ship. (a) But where the party sued as a partner for the value of goods furnished for the owners of a ship was neither a partner in fact at the time, (having parted with his share sometime before,) nor held himself out as such, having previously withdrawn his name from the firm at the counting-house, and sent circular letters to the correspondents of the house, notifying the change, the Court of King's Bench held that he could not be charged, merely because having defectively conveyed his whole share in the ship before that time, he had subsequently joined with the assignees of the bankrupt partners in the ship in making a good title to it to a purchaser from the assignees. (b) In the above case, the defendant's name was on the register of the ship, with his own consent, until after the goods, for which the action was brought, were furnished; the court, however, considered it as a question to whom *credit* was given, and held that the evidence of the register was not of itself sufficient to charge him. In this case it is observed by Mr. Justice Bayley, "That the object of the registry acts was to inform the government whether the owners were *British*, and to prevent ships belonging to foreigners from being navigated under the British flag; and the object was not to inform the tradesmen to whom they should give credit.

(a) *Camden v. Anderson*, 5 T. R. 169. But see *post*, *Dowson v. Long-*
709. See likewise this case, *ante*. ster, MS. case.

(b) *Mac Iver v. Humble*, 16 East.

The cases of *Young v. Brander*, (a) and *Frazer v. Marsh*, (b) both shew that a person may be deceived as to the true owner by looking merely at the registers; and that, therefore, before trust is given, it is proper for the tradesman to inquire further."

Of the evidence
afforded by the
registry acts.

XLIX. There is a case, the authority of which seems doubtful, that in trover for a ship, if the plaintiff produce the original register, and attempt, unsuccessfully, to deduce title under it, he cannot afterwards rely upon his possession. On the contrary, it should seem that the plaintiff's possession of the ship would be the very best *prima facie* evidence of title he could give, and that the ship's register, though necessary to perfect a title, is no evidence *per se* of ownership. (c) There is another case, likewise, which seems questionable, in which it is stated, that where a ship is purchased by a British subject from a foreigner, the production of the copy of the register from the custom-house, in which the vendee is stated to be the owner, is evidence of property without producing the bill of sale. (d) It should seem, from recent decisions, that more evidence would be required; that it would be necessary to prove either the transfer in fact, or some acts of ownership and possession, indicating property. It has been held, however, sufficient to prove the transfer of a ship in France, (where it is usual to lodge the bill of sale with an officer, and to obtain a copy from a notary,) to produce *such* copy in evidence without proof of its having been examined with the original. The reason seems to be this; that the court will give credit to a public instrument delivered out by the proper officer in a foreign country, though there may be an original, of higher authority, capable of production. (e) An affidavit of register, made by A. and B., stating that A., B., and C., are the owners, will not be evidence to affect C. Such evidence, as we have above shewn, was formerly deemed sufficient *prima facie* proof of ownership: (f) but the late cases, to which we have adverted, have decided otherwise. But in an action against the owners of a ship it is sufficient *prima facie* evidence of ownership, to put in an undertaking to appear for them, given before the commencement of the action by

(a) 8 East. 10.

(b) 13 East. 23. These cases will be cited in another Chapter, together with such cases as have occurred between mortgagor and mortgagee, as to the liability for necessities furnished to a ship;—repairs, seamen's wages, &c.

(c) *Sheriff v. Cadell*, 2 Esp. 617.

(d) *Woodward v. Larking*, 3 Esp. 287.

(e) *Ibid.*

(f) *Ditchburn v. Spracklin*, 5 Esp. 31.; and *Stokes v. Carne*, 2 Campb. 69.

Of the evidence afforded by the registry acts.

Of the general nature of the evidence in an action against ship-owners. See *vide* amendment of the law, in this respect by 4 Geo. 4. c. 41. s. 41.

the person who subsequently acted as their attorney in defending it, in which he describes them as owners; without further proof of agency. (a)

L. But in actions of this kind, where there is a difficulty in proving the defendants to be owners, it will always be prudent to obtain from the custom-house, by a proper subpoena and notice, the original affidavit upon which the ship's certificate of registry has been granted. The proof of the subscription of the parties to this affidavit will, of course, be the strongest evidence against them, upon the principle, that it is their admission upon oath that they are owners. But as there are cases under the registry acts, in which some of the owners are excused from making the affidavit required by the 26 Geo. 3. c. 60. s. 10., the fact of their ownership must, of course, (as we have above shewn) be proved by other evidence than that of the register; such, for example, as by some act of ownership; by some adoption or recognition of the register, or some quality or adjunct of possession, as, by contracting for freight, ordering repairs, or necessaries, concurring with other owners in a joint appointment of the officers of the ship, assuming a disposal of the ship or cargo, or having the accounts rendered to them. Any or all of these acts constitute a presumptive evidence of ownership, which, of course, may be rebutted by a proof of the contrary, in which the court and jury will have to decide upon the probability of opposite statements. It is the practice to produce at the trial the original book of registers from the custom-house: but this is not necessary; for as this book is a public document, an examined copy of an entry therein will be sufficient. (b) With regard to the proof of entries in public books, it is now clearly settled, that wherever an original is of a public nature, and admissible in evidence, an examined copy will equally be admitted. It is not necessary to cite cases to confirm this position, as it stands upon two strong public reasons; the first, the security of the public document, which would, of course, be endangered by frequent carriages backwards and forwards; and, secondly, for the convenience of courts and public business.

Sale of a ship not avoided, or title deemed

LI. We have already shewn that if, upon the production of the register, the requisites of the acts have not been complied

(a) Marshall v. Cliff, 4 Campb. 133.

(b) See 4 Geo. 4. c. 41. s. 41. Copies of oaths and extracts from books of registry may now be admitted in evi-

dence. It is no longer, therefore, a question as to the necessity of producing the originals.

with, and the omission appear to be with the public officers *solely*, and not with the contracting parties, it is no objection to the vesting of a title in the vendee. Several cases have decided, that where every thing required to be done by the owners, in order to transfer their interest, is regularly performed, the neglect of the custom-house officers, whether in London or elsewhere, will not void the sale, or render them liable as owners to third persons. (a) The new act makes no alteration in this respect.

defective, for the omission of the requisites of the registry acts, or mistakes by the public officers.

We have before seen that by the registry acts a trust cannot be raised in favour of persons not named in the register, (b) and that a ship purchased by one partner, and registered in his name only, shall enure as the separate property of that partner, although the purchase and outfit should be taken from the partnership funds, and the earnings placed to the partnership account. (c) Therefore, whether any one be an owner or part-owner must be determined by the evidence of the register, and by nothing else: but these acts do not require that the nature or proportion of the interest of the parties should be stated therein; nor does it concern the public to know in what particular union or division of interests part-owners stand related towards each other. The statutes provide for the transfer of property in a ship from one subject to another: but they make no mention of the variation of interest between part-owners themselves. Therefore, in a case sent by the Lord Chancellor to the Court of King's Bench, where the names of two partners in trade appeared (amongst others) on the certificate of registry as owners of a ship, that court determined, that the registry acts did not prevent the shewing how, and in what proportions, the several owners were respectively entitled; and, though the partners might derive title under different conveyances, yet, if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners became bankrupts, these shares were to be considered as joint property. (d) So, likewise, upon the rule that an agent cannot dispute the title of his principal, it has been decided that where a ship originally belonged to one of two partners, and had been conveyed to B. for

The registry acts are not of themselves evidence of, and need not state, the particular proportions in which part-owners are interested in a ship.

Ex parte Jones, 4 Maul. & Sel. 450.
See 4 Geo. 4. c. 41. ss. 30, 31, 32.

Dixon v. Hammond, 2 Barn. and Ald. 310.

(a) *Hatchford v. Meadows*, 3 Esp. 69. *Heath v. Hubbard*, 4 East. 110. *Moxam v. Hubbard*, 5 East. 367. *Underwood v. Miller*, 1 Taunt. 387. *Hubbard v. Johnstone*, 3 Taunt. 177. *Dixon v. Ewart*, 3 Merivale, 325. *Thompson v. Leak*, 1 Madd. 39.; and *Thompson v. Smith*, 1 Madd. 399.;

and see *ante*.

(b) *Heath v. Hubbard*, 4 East. 110.

(c) *Curtis v. Perry*, 6 Vesey, 739.; and *ex parte Yallop*, 15 Vesey, 60.

(d) *Ex parte Jones*, 4 Maul. & Selwyn, 450. And see 4 Geo. 4. c. 41. ss. 30, 31, 32, &c.

securing a debt, and B. became the sole registered owner of the ship, and afterwards, as *agent for both partners*, insured the ship and freight, and charged them with the premiums, and, on a loss happening, received the money from the underwriters; the Court of King's Bench held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged. (a)

When a new registry may be obtained.

LII. Having shewn that the registry of itself (though necessary to complete a title,) is not evidence of property, unless it can be confirmed by some collateral circumstance, which ascertains that such registry has been made by the authority or adoption of the persons sought to be charged as owners, it merely remains to add, that the statutes of registration have not omitted to provide for accidents and incidents, to which the certificate of registry is peculiarly exposed. Officers, therefore, are permitted to make a registry *de novo*, under the six following circumstances:—1. Where the old certificate has been lost or mislaid. (b) 2. Where the certificate is wilfully detained by the master. (c) 3. Where, after a transfer of part of the property in the same port, the owners of the part *not transferred* desire a new registry. (d) 4. Where the ship is altered in form or burthen. (e) 5. Upon any transfer of property to another port. (f) 6. And where, though the law does not require it, the parties are desirous of a new registry, upon the change of property in a ship, or otherwise. (g) It may be necessary here to add, that in order to take away all possible evasion, it is expressly prohibited to change the name of a ship. (h)

What vessels &c. need not be registered.

LIII. We shall conclude this Chapter by repeating what, in substance at least, we have before stated; that these acts apply to merchant ships only; that is, to vessels traversing the sea, or trafficking upon the sea-coast. Vessels of war, and vessels of whatever built or character, belonging to his Majesty and the Royal Family, are not required to be registered. And lighters, barges, boats, and vessels of *any built or description whatever*, used solely in inland navigation, or in rivers, are not within the compass of these acts. (i)

(a) 2 Barn. and Ald. 310. And see *Prouting v. Hammond*, 8 Taunt. 688. to the same point.

(b) 26 Geo. 3. c. 60. s. 22.

(c) 28 Geo. 3. c. 34. s. 14. and 34 Geo. 3. c. 68. s. 19.

(d) 34 Geo. 3. c. 68. s. 21.

(e) 26 Geo. 3. c. 60. s. 24.

(f) 7 & 8 Will. 3. c. 22. s. 21.

(g) 4 Geo. 4. c. 41. s. 40.

(h) 26 Geo. 3. c. 60. s. 19. 34 Geo. 3. c. 68. s. 22.; and 4 Geo. 4. c. 41. *passim*.

(i) 26 Geo. 3. c. 60. s. 6. See likewise *Laroche v. Wakeman*, Peake's N. P. p. 140.

CHAPTER III.

OF SEIZURES AND FORFEITURES FOR THE BREACH OF THE NAVIGATION LAWS, REGISTRY ACTS, &c. &c.

THE penalties which have been enacted against persons guilty of violations of the navigation and registry acts have already been brought before the notice of the reader in the detail of the several statutes themselves. It will be seen that the forfeiture of the vessel, and sometimes of the cargo, is the ordinary penalty for a breach of these laws. Unquestionably these penalties are severe; and if they were exacted with a rigorous justice, which did not relax according to the circumstances of the alleged case of forfeiture and seizure, they would deserve the character of harshness. The Legislature, however, notwithstanding its jealousy and suspicion lest these salutary laws, framed for so many important interests, should be evaded or violated, has introduced an equity and discretion, established by several acts of parliament, to controul their application; thereby accommodating them to those accidents, and sometimes to those mixed cases, where an innocent intention is not altogether apparent, which are constantly occurring in a course of extensive trade and commerce. In furtherance of this principle, and with a view to relieve merchants and ship-owners, the lords of the treasury and the commissioners of customs are empowered by an act of parliament, to which we shall presently advert, to restore ships and goods seized for a violation of these laws; such power to be limited to those cases where there is no proof of fraudulent intention.

Discretionary power vested in the Lords of the Treasury and the Board of Customs in the execution of the navigation and the registry acts, relating to shipping, trade, and commerce.

I. One of the most able decisions in this class of cases of equitable constructions is that by Lord Stowell, in the case of the *Betty, Cathcart*. It was the case of a British vessel, sailing without a register from circumstances of necessity. That learned judge decreed her not to be forfeited under the navigation acts. "The revenue and navigation laws," he says, "are certainly to be construed and applied with great exactness: they are framed for the security of great national interests; and the effect of such laws,

The Betty, Cathcart,
1 Rob 220.

founded on great purposes of public policy, must not be weakened by a minute tenderness to particular hardships. At the same time, it is not to be said that they are not subject to all considerations of rational equity; cases of unavoidable accident, invincible necessity, or the like, where the party could not act otherwise than he did, or has acted at least for the best, must be considered in this system of laws, just as in other systems;—laws that would not admit an equitable construction to be applied to the unavoidable misfortunes or necessities of men, or to the exercise of a fair discretion under difficulties, could not be laws framed for human societies. The court, therefore, will not deem it a departure from the duty of legal interpretation in such cases, to give a fair attention to considerations of this nature. The present case, (adverting to the case before him) is, in its general appearance, of a favourable aspect; it has no symptom of fraud; there is no attempt to impose; this alone, it is true, would not be sufficient; for it certainly may happen, that a *bona fide* case may incur the penalty of the law, and may become the victim of a general policy, anxious to prevent the possibilities of fraud, and therefore active in prohibiting modes of dealing which are grossly liable to abuses of that kind, though the particular transaction may not be directly impeachable.”(a) The ship was directed to be restored.

27 Geo. 3. c. 32.
51 Geo. 3. c. 96.

Powers of commissioners of customs to restore seizures, &c.

II. One of the leading acts, with respect to the vesting of a discretionary power in the commissioners of the customs to restore vessels and goods seized and forfeited for a violation of the revenue laws, was the 27 Geo. 3. c. 32. This most equitable and beneficial law, originally confined in its application to revenue seizures, is extended by a subsequent statute, (b) which authorizes the commissioners of customs in England and Scotland, according to their respective jurisdictions, to order any goods whatever, or any vessels, boats, &c. that shall be seized as forfeited, either by any officer of customs, or by any other persons whatsoever, *by virtue of any act of parliament made for the protection of trade, the benefit of commerce, or the encouragement and increasing of shipping and navigation*, or in pursuance of any other act of parliament in any respect relating to the department of customs, to be restored to the proprietor, whether such goods, &c. shall have been seized as forfeited in Great Britain, or on the high seas, or in any other of his Majesty's dominions, settlements, or plantations. This discretion, however, is not to be exercised except evidence shall be given to

(a) 1 Rob. 240. See likewise the case of the Pelican, 2 Dodson 194.

(b) 51 Geo. 3. c. 96. s. 1.

the satisfaction of the commissioners, according to their respective jurisdictions, that the forfeiture arose without any design of fraud in the proprietor of such goods. And in case the seizure shall have been made by any officer in any of his Majesty's settlements or plantations, or on the high seas, it must be made to appear to the satisfaction of the commissioners of customs in England, that the seizure was occasioned by the proprietor of such goods having acted in conformity with the orders or directions which the governor or chief officer of any settlement or plantation may have deemed it expedient, on any particular emergency, to issue.

III. But in any case wherein the commissioners shall exercise the powers vested in them, such goods, &c. shall be restored to the proprietor, in such manner, and on such terms and conditions, as, under the circumstances of the case, shall appear to the commissioners to be reasonable, and as they shall think fit to direct; and, if the proprietor shall comply with the terms and conditions prescribed by them, it shall not be lawful for the officer of customs or any other person who shall have seized such goods, &c. or any other person whatever on his behalf, to proceed in any manner for their condemnation: but, if such proprietor shall not comply with the terms and conditions, such officer or person is to be at liberty to proceed for the condemnation of such goods, &c.; provided always, that if such proprietor shall accept the terms and conditions prescribed by the commissioners of customs, such proprietor shall not have, or be entitled to any recompence or damage on account of the seizure or detention of such goods, &c., or maintain any action whatever for the same.

Terms on which restoration is to be made, 51 G. 3. c. 96.

Proprietor complying.

51 Geo. 3. c. 96.

Proprietor not complying.

IV. This act was followed by other statutes, framed upon views of the same equity and liberal policy. Thus, the 54 Geo. 3. c. 171. makes it lawful for the commissioners of the treasury, by any order made for that purpose, under their hands, to direct any ships or goods whatever, seized as forfeited, by virtue of any act relating to the revenue of customs or excise, or any act for the regulation of the trade and navigation of this kingdom, to be restored to the proprietor on the terms which shall be mentioned in any such order. The commissioners are likewise empowered to mitigate or remit any penalty or forfeiture which shall have been incurred under any law relating to his Majesty's revenue of customs or excise, or any act relating to the trade and navigation of this kingdom.

54 Geo. 3. c. 171. s. 1. How commissioners of the treasury may restore seizures.

V. The act, however, with proper precaution, provides that, in any case wherein the commissioners shall exercise the powers

Terms to be complied with, sect. 2.

vested in them, such goods shall be restored to the proprietors, or such fines, penalties, or forfeitures, remitted or mitigated, in such manner, and upon such terms as to costs or otherwise, as, *under the circumstances of the individual case*, shall appear to the commissioners to be reasonable, and as they shall think fit to direct. And no person is to be entitled to the benefit of any such order, unless the terms therein contained shall be complied with.

56 G. 3. c. 104.
s. 7. Reward to
informers.

VI. In order, however, that lenity might not relax vigilance, nor too much discourage that inspection and supervision in subordinate officers and agents, by which the interests of the revenue can alone be maintained, and encroachments and frauds repelled and punished, the same act makes it lawful for the lords commissioners of the treasury, or for the commissioners of customs or excise, under their direction, to order so much of the reward, part, or share of any seizure, or of the value thereof, as is by this act given or granted to the officers making any such seizure as they may deem proper, to be paid to the persons by whose information or through whose means and assistance such seizure may be so made; and that every such reward, or share of any such seizure, or of the value thereof, as shall, under this or any other act be payable to any officers, non-commissioned officers, petty officers, seamen or privates of his Majesty's army, navy, or marines, or acting under the orders of the commissioners of the Admiralty of Great Britain and Ireland, shall be divided and distributed in such proportions, and according to such regulations and orders as his Majesty shall, by his order or orders in council, or by his royal proclamation in that behalf, be pleased to direct or appoint. (a)

By whom actions to be
brought, s. 14.

VII. The fourteenth section of this act contains a clause which is meant to restrain vexatious informations and suits for forfeiture. It enacts, that it shall not be lawful for any person whatsoever to commence, prosecute, enter, or file, or cause to be commenced, &c. any action, bill, plaint or information against any person for the recovery of any fine, penalty, or forfeiture, incurred under any act now in force, or which shall hereafter be made, relating to his

(a) By order of the Board of Customs, dated Nov. 20, 1817, in cases of seizure of goods or vessels, when the proprietors are desirous of being acquainted with the cause of such seizure, the collector and comptroller and the seizing officers are not to withhold any proper information, on application being made to either of

them by the owner, or any person duly authorized by him. And by order of the Board of Customs, dated June 23, 1818, informers are not to have more than the reward of *one third part of the seizing officer's share*, without previous communication with, and special directions from the Board.

Majesty's revenue of customs or excise, or to issue, or cause to be issued, any writ of appraisement for the condemnation of any boat or other vessel, or any goods seized as forfeited by virtue of any such act, unless the same be commenced, &c. by order of the commissioners of customs or excise, or by or in the name of his Majesty's Attorney General; and if any action, &c. is commenced, &c. by or in the name of any person whatsoever, except upon such order, or by or in the name of his Majesty's Attorney General, the same, and all proceedings thereupon had, shall be null and void; and the court, or justices of the peace, where, or before whom, such action, &c. shall be so commenced, &c., shall not permit any proceeding to be had thereupon. (a)

(a) A rule had been obtained calling on the collector of customs for the port of Falmouth to shew cause why the writ of appraisement of certain vessels and their cargoes, sued out of this court by the seizing officer, should not be quashed, and all further proceedings thereon stayed. The application was made on the part of the commissioners of customs, in aid of an order made by them, under the authority of 51 Geo. 3. c. 96., for restoration of the subject of seizure, founded on their certificate that the forfeiture had been incurred without fraud on the part of the owners. Cause was shewn on behalf of the seizing officer, and *contrâ*:—Thomson, Chief Baron, delivered the judgment of the court, "This application," he said, "is made to the court on the part of the commissioners of customs, on the ground of their order, made in pursuance of the powers vested in them by 51 Geo. 3. c. 96., which is founded on the 27th of the same reign, c. 32. The 27th confines that power to ships seized for breach of the revenue laws. The 51st extends it to all seizures made for any cause of forfeiture whatever. In pursuance of this

power, so vested in them, the commissioners have made an order, stating that they are satisfied that no fraud was intended on the part of the masters or proprietors of the vessels seized, and that they have therefore ordered a restoration of the goods. For the seizing officer it is contended, that the commissioners have no power under the act to make such an order, without directing compensation to be made to him, and imposing terms on the proprietors for his indemnity and protection. But it appears to the court, that though, if any terms had been imposed, they must have been complied with, yet that it is not necessarily incumbent on the commissioners to ingraft terms on their order for restoration. It is as a preliminary step to the enforcing of that order, that the present application is made on the part of the Crown. Perhaps we should go too far to order the writ of appraisement to be quashed, and therefore our order will be, that all further proceedings on the writ of appraisement and indenture of seizure be stayed." Rule absolute. *In the matter of the ship Maria, and other vessels*, 1 Price's Exch. Rep. p. 4.

LAW OF NAVIGATION,

Merchant Shipping,

AND

MARITIME CONTRACTS.

PART II.

OF MERCHANT SHIPPING AND SEAMEN.

CHAPTER I.

OF OWNERS AND PART OWNERS.

Summary of
Part the First.

IN the former part of this Treatise we have been occupied in developing and explaining the general navigation system of the country. We have shewn the origin and policy of this system, as well with respect to our whole trade, as through all its subdivisions and details. We have, we trust, made it manifest, that the same reasons and the same principles, varying only according to circumstances, which occasionally throw them, in practice, into different shapes, are pursued by our navigation laws, both in our home, colonial, foreign, and European trade.

It must be obvious to every one that it is a matter of indispensable necessity to the English merchant to be instructed in a system in which the law comprehends his interests and duties. Under these circumstances, we have deemed it necessary to enter with some minuteness into the details of the several provisions for regulating the trade of our colonies; and for the sake of explaining

them, to give the reason and principle upon which they proceed. In our remarks on this trade we have been the more particular, on account of the importance of the subject and the complexity of some of the regulations. We have been equally so upon the subject of the trade with Asia, Africa, and America, which involves the charters of some of our great public companies, and more especially of the East India Company. In our observations on the European trade we have been necessarily led into a review of the late treaties of commerce: but have dispatched them with as much brevity as was consistent with clearness and utility; insisting upon nothing but what is necessary to the practical merchant, and what may operate in cases brought before our own courts of law. As respects the fisheries, we have only touched upon them shortly, as they belong rather to the custom house regulations than to a treatise on the general law of shipping and navigation. This trade, indeed, within the last few years, has been nearly wholly recast, and there is still a prevalent disposition to get rid entirely of the system of bounties. In the Chapter on the registry acts, the most important branch of our navigation law, and which has been much altered and improved by the new act, we have deemed it our duty to examine the leading decisions in full, under former acts, and to deduce such principles from them as may be safely applied in practice to analogous cases within the new statute. We now proceed to the second part of our subject, the Law of Merchant Ships and Seamen; and we shall commence with explaining the rights and duties of owners and part-owners.

I. The property of ships is acquired, as that of other chattels, either by being the fabricator of the thing, or by purchasing it of another; and ships, being personal chattels, devolve as assets to the representatives of the owners, their executors, or administrators. There is, however, this main difference in ships, as distinguishable from other personal chattels, namely, that not being subjects of market overt, and being moreover property of great value and always moving from place to place, the law will not vest the property in the buyer, unless it shall appear that the seller had authority to sell. (a) Hence property in ships, like real property, has in almost all times been transferred by written documents, in which the seller exhibits his power to sell, and by which the buyer may ascertain the safety of his purchase. Previous to the 34 Geo. 3. c. 68., it was matter of doubt whether a ship might not be transferred from hand to hand like other property, notwithstanding the previous act of the 26th of the late King. But this act required all

Of property in ships; and how acquired.

Transfer of ships to be in writing.

(a) See Abbott on Shipping, Part I. delivery of a ship by the builder, p. 2, 3, &c. See also as to the sale and Woods v. Paton, 5 Barn. & Ald. 942.

transfers of ships to be by bill of sale or other instrument in writing, which is also required by the new registry act. (a) This provision is partly on account of the great value of this species of property, and the frequent occasions on which it is absent at very remote places from the supervision of the owner; and, in part, as an additional security to the public policy of the registry acts. These written documents thus constitute a title, by means of which the transfer of vessels is greatly facilitated, and is publicly recorded, and in most cases they are the only means by which such transfer can be made. When any ship is to be sold, she is, of course, either absent upon the seas, or in her home, or in some other port. If absent upon the seas there are necessarily no means of transfer but by assignment of the grand bill of sale; and such bill of sale, together with its due entry in the book of registry, according to the provision of 4 Geo. 4. c. 41., is a perfect transfer of the property. (b) Upon the return of the vessel to her home port, the buyer should confirm his purchase by an indorsement on the certificate of registry within thirty days, or his claim may be defeated by an intervening bankruptcy, or by some subsequent transfer, which may be first registered. (c)

Possession necessary as a prudential precaution, though not actually required by law. *Sed vide* new provisions of 4 Geo. 4. c. 41. ss. 43 and 44.

II. It is the same with respect to the purchase of a vessel in her home port. The forms of the registry acts must be observed.—It is always usual, and, indeed, matter of prudence, for the purchaser to take actual possession of the ship: but it seems necessary as an act of caution rather than as a requisite of law. For the title to personal chattels by the common law vests in the owner all possessory rights, and he is entitled to maintain actions of trespass or trover without a manual possession of the chattel itself. If a part only of a vessel be sold, it is manifestly impossible that such actual delivery should be made; and, in any case, where such possession is necessary, the possession of the other part-owners will enure to the benefit of a purchaser of a part.

Mair v. Glennie, 4 Maule and Selw. 240.

Before the new registry act, an actual possession was absolutely necessary to complete the title of a mortgagee, against an intervening bankruptcy. In *Mair v. Glennie*, the plaintiffs were assignees of T. Mair, a bankrupt; the defendants were assignees of Sharp and Co. T. Mair, the bankrupt, had transferred a ship and cargo at sea, to Sharp and Co., the other bankrupts, as a security for money borrowed: but, upon the arrival of the vessel in her home port, Sharp and Co. neglected to take possession, or to do any act to notify the transfer of the property to them. Upon these cir-

(a) 4 Geo. 4. c. 41. s. 29.

(b) For the forms which the registry acts require, and the mode of

complying with them, see *ante*, Chapter on the Registry Act.

(c) See *ante*, 4 Geo. 4. c. 41. s. 37.

circumstances the Court of King's Bench determined that the property should pass to the assignees of Mair, as being in the possession, order, and disposition of Mair, at the time when he became a bankrupt. It was likewise a collateral determination in this case, that an agreement between Mair and the captain, that the captain should have one-fifth share of the profit or loss on the voyage of the ship and cargo, did not prevent Sharp and Co. from taking possession, it not being such a part-ownership as to amount to a constructive possession for himself and others. (a)

III. The case of *Robinson v. Macdonnell* fell within the same principle. This case proceeded upon the authority of *Mair v. Glennie*. It was an action of trover for a ship. B. being the registered owner, executed a bill of sale of the ship to S., as a security for advances, which had been made by S. to B. At the time of the execution of the bill of sale the ship was at sea; she returned the latter end of the year 1811. S. did not take possession: but in May, 1812, the ship was registered in the name of S. Notwithstanding this alteration, the ship continued under the controul of B., who ordered her out for the whale fishery, appointed the captain, and exercised all the ordinary acts of ownership. S. became a bankrupt; the ship returned; and shortly after B. became a bankrupt. The question was, whether B. was the ostensible owner under the statute 21 Jac. 1. c. 19. so as to give his assignees a claim to the ship. The court were of opinion that B. *was* the ostensible owner; and Lord Ellenborough, in delivering the judgment of the court, said, "The register acts were passed for purposes of public policy, and the means adopted for effecting that object are such, that every person claiming title through the medium of a conveyance, *as the act of parties*, must shew a conveyance of the form and character prescribed by those statutes. The plaintiffs did shew an original title in the bankrupt, whom they represented, grounded upon such conveyances. Has that title been divested, as against them (they being the representatives also of the general body of creditors,) by any other conveyance? It is admitted that deeds alone, in the case of an unregistered ship, would not have that effect, and we think the registration and new certificate cannot produce it. These statutes do not affect titles passing by operation of law, as to executors or administrators in case of death; or to assignees generally in case of bankruptcy. In these cases a title may be transmitted without any of the forms required by the statutes; and if a title may be

Robinson v. Macdonnell,
5 Maule and Selw. 288.
But see new Registry Act.

(a) But see the amendment made in c. 41. ss. 43. and 44. the law, in this respect, by 4 Geo. 4.

transmitted without these forms in cases of bankruptcy generally, we see no reason why it may not be so done in a particular case, falling within the scope and operation of the statute of James, though these forms have been complied with in a conveyance to others, *i. e.* the Sharps; such conveyance being fraught with all the mischief that statute was meant to prevent. The register acts make certain forms necessary to the validity of transfers and conveyances, which antecedently would have been good and valid without them: but it was never intended by the Legislature that a compliance with these forms should give validity to a transfer and conveyance which antecedently would have been bad and invalid, and we think such an effect ought not to be attributed to them." (a)

Hay v. Fairburn, 2 Barn. and Ald. 193.

IV. A point nearly similar was again brought before the court in Hay and Others, assignees of Matthews, against Fairburn. (b) Matthews, the bankrupt, the registered owner of the ship Dolphin, assigned her, then being at sea, as a security for his debt to the defendant Fairburn. The deed contained a covenant by Fairburn to re-assign upon payment of the debt, and the more important condition, *that, until the sale of the ship, Matthews was to be permitted to have, hold, and enjoy the same, and to receive the ship's earnings* for his own benefit. All the requisites of the registry acts were complied with so as to vest the legal interest in Fairburn. At the time of the execution of the assignment Matthews had possession of the vessel, and continued in possession, and in the apparent exercise of ownership, until his bankruptcy. The defendant never interfered in any way with the conduct or management until the 1st of June, 1816, when he took possession, displaced the master, and appointed one under himself. The commission against Matthews issued on the 11th of May, 1816, under which he was duly declared a bankrupt. Fairburn's demand upon the ship had been reduced by payments to about 595*l.*; he sold the ship, and the proceeds remained in his hands. The question for the opinion of the Court of King's Bench was, whether the bankrupt was not to be considered the ostensible owner under the 21 Jac. 1. c. 19. The court gave judgment for the plaintiffs, on the authority of the case of Robinson v. Macdonnell: but, on account of its importance, they permitted

(a) 2 Barn. and Ald. p. 196, where this judgment is cited. And 5 Maule and Selw. 288. And see the alteration made, by the new registry act, in the law as to the mortgage of ships,

and the application of 21 Jac. 1. c. 19 to the reputed ownership in cases of ships, *ante*, Chapter on the Registry Acts.

(b) 2 Barn. and Ald. p. 193.

it to be turned into a special verdict. The case was afterwards heard in the Exchequer Chamber, and the judgment of the Court of King's Bench confirmed.

V. These cases illustrate, very strongly, the expediency, not to say the prudential necessity, of confirming a purchase of ships by an actual possession as soon as possible; not, as we have above said, that such possession is necessary to complete a title in law: but as a caution to remove such contracts from any possible operation of the bankrupt acts, and from the presumptions of courts upon cases where an execution may issue against an apparent owner.

Thus, in the recent case of *Kirkley v. Hodgson*, which was determined under the following circumstances. A. B. being sole owner of a ship, by indenture of the 24th June, 1819, assigned three-fourth shares of it to a creditor, as security for a debt. The deed contained clauses by which the creditor was to re-convey the three-fourth shares upon payment of his debt; and a power of sale was given to the creditor, in case the debt was not paid within a given time. No possession was given, and A. B. was to be *permitted to freight the ship*, and to load cargoes from time to time, &c., and was to insure the ship for the amount of the debt in the name of the creditor; or otherwise to assign the policies to him. At the time of the execution of the deed, the ship *was absent* from her port of registry on a voyage to North America: but all the forms prescribed by the ship registry acts, as to the transfer, were duly complied with. The ship returned to her port of registry in July 1819, and was constantly employed from that time till February 1822, by A. B. in carrying cargoes for his own use, and on his sole account; and he continued during all that time in the *actual possession* of the ship, and proceeded to manage and navigate her without the interference or controul of the creditor. A. B. having become bankrupt, it was decided in the King's Bench, that as he had once been the real owner of the ship, and had never done any thing to make it notorious to the world that he had ceased to be the owner of the three-fourth shares, he continued to be the apparent owner of those shares, with the consent of the true owner, down to the time of the act of bankruptcy, and, therefore, that those shares passed to his assignees, as property, in his order and disposition, within the meaning of the 21 Jac. 1. c. 19. (a).

Kirkley v. Hodgson,
1 Barn. and Cress. 588.

(a) The Reader is referred to the very learned judgment of Mr. Justice Bayley in this case, which is too long

for insertion in this Treatise, 1 Barn. and Cress. 596.

Of the transfer and mortgage of ships, and shares of ships, by 4 Geo. 4. c. 41.; and the qualification of the 21 Jac. 1. c. 19. s. 11. (as to reputed ownership) in such cases of mortgage and transfers.

VI. Amongst the other benefits conferred upon the mercantile body by the new registry act, 4 Geo. 4. c. 41., it is perhaps the most important, that by a series of brief and perspicuous clauses, it has not only afforded the greatest possible facility to the transfer of ships, and shares of ships, but has, at the same time, so qualified the general law, and particularly the act of 21 Jac. 1. c. 19., as to reputed ownership, as to give to the transfer and mortgage of a ship, or shares of a ship, a degree of security never hitherto possessed by them. By the 29th section, the statute of 4 Geo. 4. c. 41., as we have shewn in the Chapter on the registry acts, requires all transfers of ships, or shares, to be by bill of sale, or other instrument *in writing*. By the 35th section, no such bill of sale, or other instrument in writing, is valid to pass the property of a ship, or share of a ship, *until* such bill of sale shall be produced to the registering officer of the ship's port, and an *entry* of such bill of sale and its particulars, be made by such officer in the book of registries. And if the ship's certificate of registry shall be produced to the officers at the same time (as in common prudence it ought to be, if the ship be in the port of transfer at the time) the registering officers are directed to make an indorsement of such bill of sale upon the certificate of registry. And further (for the convenience of future transfers) the same officers are directed, if required, to certify (by indorsement on the bill of sale) that such sale has been duly entered and indorsed on the certificate of registry. By the 36th section, such entry in the book of registers shall render the bill of sale or mortgage valid and effectual to pass or bind the property to all intents and purposes; subject only to the following limitations, that is to say, that when the bill of sale has been so entered, thirty days from the date of entry (if the ship be in her port), or thirty days from the day of the ship's arrival in her port (if she shall be absent) shall be allowed for the production of the certificate of registry, and for the indorsement upon it of the particulars of the bill of sale. If the certificate be then produced and indorsed, the transfer is complete, and passes the property. If it be not then produced, any other transfer (the parties to which shall first produce the certificate) will be entitled to such indorsement, and of course to a priority of property in the ship or share. By the 44th section of the same act, when any mortgage has been so duly registered, the rights of the mortgagee will not be affected by any act of bankruptcy of the mortgagor, although such mortgagor may be at the time the reputed owner of the ship or share, and may have the order and disposition of the same.

Of the transfer and mortgage of ships, and shares of ships, by 4 Geo. 4. c. 41.; and the qualification of the 21 Jac. 1. c. 19. s. 11. (as to reputed ownership) in such cases of mortgage and transfers.

VII. It is scarcely necessary to observe that the above clauses put an effectual end to all such future cases as those above cited; (a) in which a former ship-owner had transferred his ship as a security for money borrowed, and became bankrupt before the mortgagee had taken *actual* possession of the ship. We have seen, that under such circumstances, the courts have holden that the assignees of the bankrupt (the bankrupt being the reputed owner) were entitled to the ship, and that the mortgagees must relinquish her. By the 44th clause of the new registry act, it would now be sufficient, in a case of this kind, to enter the mortgage in the book of registers, during the absence of the ship; and upon her return (that is, within thirty days after) to have the indorsement on the ship's certificate made by the proper officers. The two cases of *Robinson v. Macdonnell*, (b) and *Hay v. Fairburn*, (c) proceeded on the same principle; and would, at the present time, fall under the same remedy. In *Robinson v. Macdonnell*, the mortgagee had actually registered the ship before the bankruptcy of the mortgagor: but as the mortgagor continued in the actual possession of the ship, and exercised all the acts of owner, the court held, that under the statute of James the assignees of the mortgagor were entitled to it. The case of *Hay v. Fairburn*, (d) appears to be the precise case, which led the framer of the new register act to the introduction of these most useful clauses, and particularly to the 43d and 44th clauses; by which it is provided that a mortgagee shall not be deemed an owner (*as to the ship's debts*) and that a mortgagor, not only *need not* be put out of the possession, use, and disposition of the ship, but *shall not* be deemed to be out of possession; and that although the mortgagor should continue, as heretofore, in the use, possession, and controul of the ship, the 21 Jac. 1. c. 19. s. 11., (the reputed ownership clause) shall not attach, so as to affect the rights of the mortgagee. In *Hay v. Fairburn*, which was likewise an assignment of a ship as a security for a debt, there was a positive condition that the assignor should have the use of the ship; and upon this ground the court held that the ship was in the order, disposition, and controul of the assignor, and therefore, under the circumstance of his bank-

cases shortly, as many contracts may be under the condition of the old law.

(b) 5 Maule and Selw. 288.

(c) 2 Barn. and Ald. 193.

(d) 2 Barn. and Ald. 194.

(a) *Mair v. Glennie*, 4 Maule and Selw. 240. *Robinson v. Macdonnell*, 5 Maule & Selw. 288. and 2 Barn. & Ald. 196. *Hay v. Fairburn*, 2 Barn. & Ald. 193. *Kirkley v. Hodgson*, 1 Barn. and Cress. 588. We have, however, thought it necessary to cite these

ruptcy, passed to his assignees. The more recent case of *Kirkley v. Hodgson* falls within the principle of the cases of *reputed ownership*, and was determined upon the 21 Jac. 1. c. 19. s. 11. Although it differs in some particulars, it is in conformity in principle with the decisions in the previous cases. All these cases, as above said, would now fall within the remedy of the 43d and 44th clauses of 4 Geo. 4. c. 41.

Of property in
ships taken as
prize.

VIII. The two most usual ways of acquiring property in ships are, by building the vessel, or purchasing it from another. A third mode is by capture from an enemy in time of war, the captor having a legal title to make the prize, and the vessel being afterwards condemned in a suitable court. Such capture must necessarily be made by a King's ship, a private vessel having letters of marque, or a merchant vessel fighting in its own defence. But in almost all these cases, the capture, in practice, almost immediately resolves itself into a sale; the prize being taken into a suitable port, upon condemnation sold, and the proceeds divided amongst the captors. This immediate sale is so much indeed the natural course, that the acts of parliament, by which prizes are permitted to be registered as British ships, always presume their sale. The purchasers of captured vessels, therefore, may apply for their register in the same manner as if such vessels were British built; except that, in order to prevent frauds, they must produce to the proper officer of the customs a certificate of condemnation under the hand and seal of the judge of the court in which the ship has been condemned, together with an oath of the vessel's identity.

Of property in
ships acquired
by a purchase
from pirates.

IX. As pirates are robbers, and as a sale by them is, of course, only a sale by robbers, a third party, though a *bona fide* purchaser, cannot claim against an owner upon the allegation of a capture by such pirates, and a sale to himself. Such a taking is not a capture, but a robbery; and does not divest the property of the owner. But an eminent distinction must be taken here with respect to captures made by Algerines, Tunisians, and other of the Barbary States. Such states, at least, before the last treaty, were considered to be in perpetual hostility with Christian communities, and captures made by them were deemed to be captures by an enemy. No case has arisen since the treaty made after the late expedition by Lord Exmouth. As respects the Algerines and their dependencies, the only African power comprehended in the treaty, a doubt might reasonably arise in a court whether captures made subsequent to this treaty were to be deemed as acts of piracy, or as captures made by an enemy. But this question can

only arise with respect to the vessels of Algiers and Tunis. But before this treaty, all captures by these powers were deemed sufficient to give a title to a third party being a *bona fide* purchaser. In the *Helena*, Heslop, (a) it was decided by Lord Stowell, that the capture and sale of an English ship, by a vessel belonging to the Dey of Algiers, was not such a piratical seizure as to affect the conversion.

X. But in all cases of legal capture a sentence of condemnation is necessary to complete the title of the purchaser; and he should accordingly not neglect to demand it as one of the muniments of the ship. In the *Flad Oyen*, (b) the *Kierlighett*, (c) and the *Prosperous*, (d) the vessels, after capture, were restored by the Court of Admiralty to their original owners upon two principles;

Of property in ships sold under a sentence of condemnation in the Admiralty Courts.

1. That such sentence of condemnation was necessary to complete a legal alienation of the ship; and, 2. That in the case of those vessels, such sentence had been pronounced by an insufficient jurisdiction; namely, by a consul or minister of a belligerent power in the country of a neutral state. Indeed, the courts of this country are so careful not to infringe upon the rights of neutral nations, that in the *Herstelder* (e) a decree, which had been passed upon a vessel, described as lying at Plymouth, was rescinded, on its appearing that she was in fact in a port of Norway at the time of adjudication: the court refusing to condemn a vessel lying in a neutral port.

XI. Under these decisions, two important points seem fully established with respect to the property in ships acquired by capture, and purchases under them. The first, that condemnation is always necessary; and, secondly, that such condemnation must be by a sufficient court. In the case of the *Flad Oyen*, above cited, Lord Stowell gave a decision so strongly illustrative of this mode of Admiralty law, and of the reasons upon which it rests, that, with some condensation, we shall here cite it. He observed, that it has been deemed peculiar to the law of England to require a sentence of condemnation, as necessary to transfer the property of prize, whilst with other nations the simple act of keeping possession of such prize for twenty-four hours, and bringing her *infra præsidia*, was a sufficient conversion. But this notion is not correct, the more general practice amongst European nations being, to require a sentence of condemnation; and

The *Flad Oyen*.

(a) 4 Rob. 3.

(d) Abbott. 15.

(b) 1 Rob. 135.

(e) 1 Rob. 119.

(c) 3 Rob. 96.

Of property
in ships sold
under a sen-
tence of con-
demnation in
the Admiralty
Courts.

in the cases of sale by the captors to deliver over such sentence of condemnation as one of the titles of the ship. And this is the law of England: but it is not sufficient that there should be a sentence of condemnation; it must likewise be by a sufficient jurisdiction. It is entirely contrary to the usage and practice of nations, that such sentence should proceed from a tribunal not existing in the belligerent country. A court of such jurisdiction can only exist within some part of the belligerent country itself.

The *Slyboom*.

XII. In the *Christopher, Slyboom* (a) it was decided by the same eminent judge, that a sentence of condemnation, passed in the country of the enemy upon a British prize ship, lying in the port of an ally of the enemy, was valid. This is manifest; such ally being, of course, a member of the belligerent power. And where vessels have been legally condemned, that is to say, condemned by a sufficient tribunal, and transferred to neutral purchasers, the legality of such conveyance, whether as respects vessels formerly enemy's property, or of our own country, cannot be disputed here. In the *Nostra Signora de los Angeles*, (b) the

The *Nostra Signora*.

circumstances were of great nicety, the point of a previous insufficient condemnation being implicated in the question of a second seizure by the king. This vessel had been taken by a French privateer, carried into a Spanish port, and sold to a Spaniard, prior to the war between England and Spain. Being seized in the port of London on the breaking out of Spanish hostilities, and proceedings commenced in the Instance court on the part of the former owner against the ship, as not having been legally converted by a condemnation to the French captor, she was decreed to be restored to the former owner; the crown, standing in the place of the Spanish purchaser, not being able to shew that any legal sentence of condemnation and sale had taken place. But, though the Admiralty Courts have always maintained the principle that a ship, lying in a neutral port, shall not be condemned by any agent or jurisdiction whatever acting in such neutral port or country, and have generally extended the rule so far as not even to admit the condemnation of a prize in a neutral port by the nearest tribunal in a belligerent country, it was nevertheless decided by Lord Stowell, in the *Henrick and Maria*, (c) that there might exist a state of circumstances under which a condemnation in the court of the enemy of a prize ship, lying in a neutral port, might be sufficient to warrant a sale to a neutral merchant, on the principles of reciprocity, arising out of the

Henrick and Maria.

(a) 2 Rob. 209.

(b) 3 Rob. 287.

(c) 4 Rob. 43.

modern practice of our own prize courts, which exercise a power of adjudication over vessels of the enemy carried into foreign neutral ports. Lord Stowell, in this case, said, that the court was bound, against the *true principle*, by the practice which it has not only admitted, but applied; for that in the conduct of war you must hold that to be lawful to your enemy which you practise yourself. But that the true and better principle was, that the belligerent should have, at the time, a safe and certain possession of the prize, and, therefore, that it should not be condemned whilst lying in a neutral port. (a) In conformity with the principle of these decisions in the Admiralty, the courts of common law have almost invariably regulated their practice, holding that if the prize courts condemn captured vessels, the sentence, whilst unappealed from, is conclusive in the common law courts, and to all the world. (b) The common law courts, indeed, cannot entertain jurisdiction of the question whether prize or no prize, or by whom taken. So, likewise, if it can be discerned on the face of the sentence of a foreign court of prize, that such court has condemned a ship on any sufficient ground, the sentence is conclusive evidence in the courts here of the *facts* of such ground of condemnation. (c) But the same distinction is to be taken in this case, as in the case of our own superior courts reviewing the judgments of subordinate tribunals. Such superior courts will not enter again into facts already decided by a sufficient jurisdiction. But if it appear upon the very face of the case, that such judgment has been manifestly given, either against the evidence of such facts, or to a greater extent than is warranted by the facts; if there be a manifest error of judgment, or excess of jurisdiction; in all such cases our own courts will wholly disregard the decision of the foreign tribunal. It will only not re-try the same facts. (d) But in all these cases the mere production of the foreign sentence of condemnation is a *prima facie* and presumptive evidence that its judgment is just, and therein conclusive upon our own courts. But in the case of *Bernardi v. Motteux*, (e) where there was some ambiguity in the sentence, so that the precise

(a) See likewise 5 Rob. 285; the *Comet*.

(b) *Duckworth v. Tucker*, 2 Taunt. 7; and *Park on Insurance*, 490.

(c) *Bolton v. Gladstone*, 2 Taunt. 85.

(d) *Pollard v. Bell*, 8 T. R. 444.
Baring v. Claggett, 3 B. and P. 215.

Oddy v. Bovil, 2 East. 473. *Havelock v. Rockwood*, 8 T. R. 268.

(e) 2 Dougl. 574. 3 B. and P. 215.; and *Phillips on Evidence*, 269. The reader will, of course, consult this most able and perspicuous writer on all questions of evidence.

Of property
in ships sold
under a sen-
tence of con-
demnation in
the Admiralty
Court.

ground of the determination could not be collected, the Court of King's Bench considered themselves at liberty to examine whether the ground on which the sentence proceeded, but which was not stated, actually falsified the warranty contained in the policy of insurance which was then before the court, and on which an action was brought. Hence, it follows, that it does not lie on the party, who produces the sentence, to shew that it has proceeded on the ground of enemy's property: but it is incumbent on the party who objects to the sentence, to make out that it has proceeded on some other ground. But where the sentence professes to be made *on particular grounds*, which are set forth in the sentence, but which manifestly appear not to warrant the condemnation, the sentence will not be conclusive as to such facts. (a)

So much property has been derived to British merchants from captures; and, (though happily the country is at present enjoying a state of peace,) so many causes of future war are inherent in the very greatness of our empire and its commerce, that the commercial law of war is scarcely of less importance to the merchant than the system of the same law during a period of peace. Capture being one of the legitimate modes of acquiring property in merchant ships, it was manifestly expedient to detail and examine the leading cases upon this head.

Of the title to
ships by mort-
gage, and the
rights and lia-
bilities of the
mortgagee.

XIII. Three modes of title to this species of property have been above examined, namely, building, purchase, and capture. A compliance with the forms of the registry acts in all of them is presumed, without which no title can exist to British ships: there remains a fourth, no less frequent, and equally important with the above, *viz.* title by mortgage, of which we have before spoken incidentally. Before the new registry act, (4 Geo. 4. c. 41.) there existed some degree of insecurity, and still more of practical inconvenience, in this species of title. There existed likewise great doubt, whether in some cases, and particularly where the mortgagee received the freight and earnings of the vessel, he was not responsible for the seamen's wages, and even for the repairs during the voyage. It is true, that there is no effectual difference between the mortgagee of a ship out of possession, and the mortgagee of house or lands in the same circumstance; and the courts of law had decided all such cases upon this principle. But the new registry act, as we have previously shewn, has put at rest all such future cases by a positive enactment, *that the mortgagee shall not be regarded as the owner, and that the mortgagor shall not be deemed to be out of pos-*

(a) *Calvert v. Bovil*, 1 T. R. 523.

cession. (a) This act indeed has conferred three great and main benefits upon the mortgagees of ships and shares of ships. 1. The one just mentioned, that the mortgagee shall not be deemed owner by reason of the register of his mortgage; and, by necessary consequence, shall not be answerable for repairs, stores, seamen's wages, &c. 2. That the mortgagor may remain in the use and disposition of the ship, without subjecting the rights of the mortgagee to the operation of the statute of 21 Jac. 1. c. 19. s. 11., in the event of the bankruptcy of the mortgagor. 3. That the mortgage may be registered as such; and of course that the title, and the extent of it, may be expressed in a public record, and an unquestionable certificate granted upon such record.

Of the title to ships by mortgage, and the rights and liabilities of the mortgagee.

XIV. It is scarcely necessary to add, that the above positive provisions of the new register act, preclude in future the possibility of such cases as *Westerdell v. Dale*, *Jackson v. Vernon*, *Young v. Brander*, *Trewhella v. Rowe*, and *Mac Iver and Humble*, (b) all of which turned upon the same point, whether the mortgagee of a ship, not actually in possession, (but in some of the cases reaping all the ship's earnings) was not responsible for repairs, wages, stores, &c. All cases of this kind will hereafter fall under the positive enactment of 4 Geo. 4. c. 41. s. 43. that is, that mortgagees shall not be deemed to be owners, except in so far as is necessary to compel the sale of the ship, if the money for which the mortgage or assignment be made, be not duly paid according to the condition of the security.

XV. In the case of chartered vessels taken up by charter-party, or other instrument, and laden by the freighter with his own goods, or with goods belonging to different persons, the registered owner is not responsible to such persons, but the charterer is to be considered as owner of the ship with respect to them. It must be confessed, however, that some ambiguity arises from the cases on this subject. In *Parish v. Crawford*, before Lord Chief Justice Lee, (c) where the defendant, the owner of a ship, had chartered her to one Fletcher for a voyage for a specific sum; but the freight of passengers was reserved to the defendant, who likewise appointed the master, and covenanted with Fletcher for the condition of the ship, and the behaviour of the master; he was, notwithstanding, held liable to the owner

Parish v. Crawford.

(a) 4 Geo. 4. c. 41. s. 43 and 44.

(b) 7 T. R. 306. 1 Hen. Black. 114.
8 East. 10. 11 East. 435. 16 East. 169.

(c) 3 Str. 1251; more fully re-

ported in Abbott, 22. But this subject will be more fully discussed in the chapter on Freight.

How far an owner continues liable when he char-
ters his vessel to another.

James v. Jones.

of goods, taken on board by the charterer, who received the freight, but did not deliver the goods. In a subsequent case (a) the decision of Lord Kenyon was different. It was an action brought against the defendants, as owners of the *Sea Flower*, for a loss of some goods on a voyage from Faro to London. One Thomas, the master of the ship, had in his own name as master, and in the absence of the owners, chartered the ship to Reed and Parkinson, on her voyage from Falmouth to Faro, and back to London; and Reed and Parkinson engaged by the charter-party to provide a full lading from Faro, and to pay a stipulated price per ton. The goods were shipped at Faro, by the consent of the agent of Reed and Parkinson at that place; and Thomas, the master, signed a bill of lading, engaging to deliver them to the plaintiff, he paying freight *per* charter-party. These facts appearing at the trial of the cause before Lord Kenyon, his Lordship was of opinion that Reed and Parkinson were, with respect to the plaintiff, owners of the ship *pro hac vice*; that the defendants, Jones and Others, were not responsible to him; and, consequently, that the plaintiff could not maintain his action. So, likewise, in the case of

Mackenzie v.
Rowe.

Mackenzie v. Rowe and Others. (b) This was an action for the non-delivery of fifty casks of oats, shipped on board the *Trafalgar*, to be carried from London to Surinam. The facts relied upon by the plaintiff were, that the defendants were registered owners of the ship in question; that the oats had been put on board in the port of London, for the purpose of being carried to Surinam, to which place she was then bound; and that afterwards, the ship not being able to make Demarara, the captain improperly sold the oats. There was, however, no evidence that the oats had been received on board the ship by any person *appointed by* the defendants; and it was proved that they had chartered her for this voyage to Surinam to a person of the name of De Beur, who had put her up as a general ship. Lord Ellenborough held, that the registered owners of the ship were not, under these circumstances, liable for the non-delivery of the oats, and directed a nonsuit. The same principle was adopted by the Court of King's Bench in

Frazer v. Marsh.

the subsequent case of Frazer v. Marsh. (c) The case was this:—The defendant became the purchaser of a ship under a sale by the sheriff, in October, 1805; and an assignment of it to the defendant was prepared in the same month: but the sheriff would not execute it till the whole of the purchase money was paid, which was

(a) James v. Jones and Others, 3
Esp. 27. and Abbott, 24.

(b) 2 Camp. 482.

(c) Frazer v. Marsh, 13 East. 238.

not till 1810. The defendant, however, was put into possession of the ship immediately after the sale, and got her registered in his own name. Afterwards, by a charter-party, he let the ship for a *given number of voyages, and at a certain rent*, to one Walker, who was then the captain, and who afterwards ordered stores for the use of the ship, which were supplied by the plaintiff. For the value of these stores this action was brought against the defendant, as registered owner. But Lord Ellenborough, C. J., before whom the cause was tried, at Guildhall, nonsuited the plaintiff being of opinion, that during the existence of the lease the relation of master and owner ceased to subsist between Walker and the defendant, and that the stores must be taken to be ordered on Walker's own account. The plaintiff's counsel applied to set aside the nonsuit: but the whole court concurred in the decision of the learned judge at nisi prius. "The register acts (said Lord Ellenborough,) were passed *diverso intuitu*: but to say that the registered owner, who divests himself, by the charter-party, of all controul and possession of the vessel for the time being, in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by the order of the captain during the time, would be pushing the effect of those acts much too far. The question is, whether the captain in this instance, who ordered the stores, were or were not the servant of the defendant, who is sued as owner. And as they did not stand at the time in the relation of owner and master to each other, the captain was not the defendant's servant; and, therefore, the latter is not liable for his act."

How far an owner continues liable when he charter his vessel to another.

XVI. When repairs are done to a ship, without *express* orders from the owners, (the master who manages the ship superintending the repairs,) it is of course customary for the tradesmen to charge the owners, whose names are on the registry; and they are in most cases responsible by law. But questions have sometimes arisen as to whom the *credit* has been given; and cases have occurred, where it has not been deemed sufficient to charge a party, although his name stands on the ship's registry.

Of the liability of the registered owners for repairs, &c.

It is a rule, indeed, that the register and certificate of registry shall be conclusive evidence of want of title in those not named therein: but we have before shewn (*a*) that the insertion of the name of a person upon a registry is not sufficient of itself to bind him to contribute to the debts of the ships. In the case of a mortgagee, it was holden, before the express enactment in the

(a) See Chapter on the Registry Acts.

Of the Liability
of the regis-
tered owners
for repairs, &c.

4 Geo. 4. c. 41. s. 44. that he was not liable when out of possession: but many cases occurred, independent of a mortgage, in which it has been sought to charge a party with the debts of the ship, upon the sole ground of his name being on the register. Thus, for example, in *Tinkler v. Walpole*, (a) and *Mac Iver v. Humble*, before cited, in which the courts decided, that the insertion of the defendants' names on the ship's registry was not *per se* sufficient to make them liable for debts contracted on account of the ship. All these cases proceed upon the same principle;—first, that it is a question of fact to whom credit is given; and, secondly, that the owner, or part-owner of a ship, like the owner of a house or land, may have so completely divested himself of the actual possession of the property, by having let it out to a charterer, or other lessee, that the mere circumstance of his being owner, and being recorded as such by his own act (for such is the legal effect of a complete registry,) is as insufficient to fix him with necessary repairs, stores, &c. contributed to the property in the one case, as in the other. But where such owner, or part owner, not only continues his name on the register, but has a beneficial interest in the vessel, and in the repairs done to her, and the stores afforded to her at the time, (though professing to have parted with all his property by a bill of sale,) he is answerable to the tradesmen who furnish necessaries to the ship. Thus in the case of *Dowson v. Longster and Leeke*. (b) In this case an action was brought upon a bill of exchange, for 884*l.* accepted, by one Longster. Longster suffered judgment to go by default: but the other defendant, Leeke, pleaded that he was not liable. The plaintiffs were shipwrights residing at Limehouse. Both the defendants *had been* the owners of a ship called the *Ranger*, and Longster was the water-side manager. In 1813 the plaintiffs repaired the vessel; and drew a bill upon Longster, the acting partner, for the repairs. This bill was paid; and the vessel in June 1819, was again put into the plaintiff's docks, where she underwent repairs amounting to 847*l.* 11*s.* 9*d.*; for which, and for repairs amounting to 36*l.* 8*s.* (done in 1820) the present bill of exchange was accepted by Longster. This bill was dishonoured; notice was given to Leeke, who said that he was not liable, as he had parted with his interest in the vessel to Longster in Dec. 1818. It appeared, however, that Leeke's name remained on the register

Dowson v.
Longster, MS.

(a) *Tinkler v. Walpole*, 14. East. gistry Acts, *ante*.

236. *ante*, *Mac Iver v. Humble*, 16 (b) MS. tried at Guildhall, April, East. 169. See chapter on the Re- 1823, Abbott, L. C. J.

of the vessel until June 1820, which circumstance, it was contended, rendered him liable to the present demand. The consideration of the bill of exchange, which was for repairs, the presentation and non-payment of the bill, the notice to Leeke of the non-payment, and his declaration, *that he kept his name on the register of the vessel as a collateral security for three bills of exchange* accepted by Longster for his (Leeke's) moiety of the ship, were proved. One of the three bills did not fall due until December 1819. It was contended for the defendant, that as he had sold his beneficial interest in the vessel in December 1818, the plaintiffs could only look to Longster for the repairs; and as a proof of the plaintiffs' not considering Leeke liable, and of their knowledge of the sale, the bill for the repairs was in the name of "Longster, owner of the ship Ranger." The agreement entered into between the defendants, in December 1818, was proved: but it was not an actual deed of sale. By the agreement, Leeke was bound to convey all his interest in the vessel to Longster, upon payment of the three bills of exchange, drawn by him on Longster. Abbott, L. C. J. said, that in point of law, the transfer of Leeke's moiety of the ship was not completed until June 1820, and that he had a beneficial interest until the payment of the three bills of exchange. That his name was continued on the registry to preserve this interest; and that of course, under the circumstances of the case, he became liable to the plaintiffs for necessary repairs.

Part-owners.

XVII. We now come to the more particular consideration of part ownership, a relation of shipping which brings it, though a personal chattel, a good deal within the analogy of a joint-tenancy, and tenancy in common in real property. It will be immediately seen, indeed, notwithstanding an authority hereafter to be mentioned, that part owners of a vessel are not joint tenants, but, in all cases, tenants in common. The distinction of these two modes of tenure is substantially in the circumstance, that joint tenants have not only an unity of title, but an unity of interest, an unity of time, and unity of possession. They have a concurrent right to the whole; they have the same right in the smallest particle or division of the whole as in the whole itself; that is to say, joint tenants have nothing several and distinct. But tenants in common, on the other hand, have a right to some certain and distinct portion; only that such part is not yet marked out and ascertained, but all occupy promiscuously. This latter is always the relationship of part owners in a ship. Each has a proportion of the vessel according to his *quota* of the capital concerned, or of

Not joint-tenants, but tenants in common.

the whole purchase. But from the nature of the thing such portion cannot be marked out *in re*; and, therefore, like the profit of the owners of a water mill, of a fishery, &c. must be assigned in the proportion of the ship's earnings.

Doddington v.
Hallett.

XVIII. We have said that part owners in ships are not joint tenants, but tenants in common, a distinction from which many important properties arise. In the first place, there is no *jus accrescendi*, or right of survivorship, a quality, which being appended to a possession *per my et per tout*, at common law, always accompanies joint-tenancy. In the second place, part-owners have no specific lien upon the common property in respect to advances and balances. In *Doddington v. Hallett*, (a) an early case decided by Lord Hardwicke, it was holden that part-owners of a ship *had* a specific lien on the shares of each other for the balances due to them. The case was this.—It appeared that the plaintiffs had covenanted with one T. Hall, who died intestate, to take certain shares subscribed for by them, and which amounted together to *eleven sixteenths* of a ship, to be built and fitted out under his directions, for the service of the East India Company; that the ship was accordingly built and equipped, and was then at sea, and the builder had executed a general bill of sale of the whole to him, and he had not executed any bill of sale to them for their respective shares. The defendant, by his answer, admitted that he was a trustee for the plaintiff as to the *eleven sixteenths*, but submitted that they were not liable to the tradesmen, because the debts were contracted by the intestate; and further insisted, that they had no specific lien on the shares, which not being subscribed for, belonged to him. The Lord Chancellor decreed a reference to the master to take the accounts, and directed allowance to be made to the plaintiffs for all such sums as they had paid, or were liable to pay to the tradesmen or workmen for building, equipping, or victualling the ship, or for seamen's wages; and declared that if any balance should appear due to them, *they had a specific lien on the remaining shares for such balance*; and those shares were to be sold before the master, and the money applied in the first place to the discharge of such balance. The case of *Doddington v. Hallett* is, however, a single case, never acted upon; and has been expressly over-ruled by a very modern decision of Lord Eldon, in *ex parte Young*. (b) The petitioners were part-owners of a ship, called the Grenville Bay, with other

Ex parte
Young.

(a) 1 Vesey, 497; and see Abbot, 99.

(b) Vesey and Beames' Reports, Vol. II. p. 242.

persons; two of whom, William Lushington, senior and junior, became bankrupts on the 6th of January 1812. The bankrupts were also the managing owners; and in that character were indebted to the petitioners and the other owners 287*l.* on balance of accounts for the freight and earnings of the ship, after taking credit for the outfit, amounting to 2234*l.*; which sum the bankrupts had not paid; and after the bankruptcy the other owners were obliged to pay it. The assignees sold the share of the bankrupts for 780*l.*

The petition prayed an application of the proceeds of the share of the bankrupts in the ship, freight, &c. towards satisfaction of the sums so due to the petitioners and the other owners. The Lord Chancellor observed, "The difficulty in this case arises upon the decision of *Doddington v. Hallet*, by Lord Hardwicke; which is directly in point. That case is questioned by Mr. Abbott, (a) who doubts what would be done with it at this day; and I adopt the doubt. The case, which is given by Mr. Abbott, from the register's book, is a clear decision by Lord Hardwicke, that part-owners of a ship, being tenants in common, and not joint-tenants, have a right, notwithstanding, to consider that as a chattel, used in partnership, and liable, as partnership effects, to pay all debts whatever, to which any of them are liable on account of the ship. His opinion went the length, that the tenant in common had a right to a sale. There is great difficulty upon that case; and the inclination of my judgment is against it: but it would be a very strong act for me, by an order in bankruptcy, from which there is no appeal, to reverse a decree made by Lord Hardwicke in a cause. From a manuscript note, I know it was his most solemn and deliberate opinion, after great consideration, that the contrary could not be maintained; and there is no decision in equity contradicting that." Upon a subsequent day, the Lord Chancellor said that, after great consideration, he must decide against the case of *Doddington v. Hallett*.

Part-owners have no specific lien on the ship in respect to advances made by them for the use of the ship, or for balances due to them from other part-owners on account of the ship.

XIX. Another important property, resulting from this relation of part-owners being tenants in common, is, that upon the death of any one of them his share goes, as his personal assets, to his representatives, his executors, or administrators; in short, that his partners as such can have no claim on it in the way of lien, nor can derive any right from his death which they did not possess in his lifetime.

XX. The new Registry act 4 Geo. 4. c. 41. s. 30. has introduced a very useful regulation, in case of vessels owned by joint

(a) Abbott, p. 99.

Part-owners.
Joint stock
companies, and
mercantile
partnerships in
ships and
shares of ships.

stock companies, or mercantile partnerships. It is rendered lawful, by this act, for any number of owners, named and described in the registry, being partners in any house, or copartnership, actually carrying on trade in any part of his Majesty's dominions, to hold any ship or vessel, or any share or shares of any ship or vessel, in the name of such house or copartnership as joint-owners, without distinguishing the proportionate interest of each of such owners. And it is further provided that such ship or vessel, or the share or shares thereof, so holden in copartnership, shall be deemed and taken to be *partnership property* to all intents and purposes; and shall be governed, by the same rules, both in law and equity, as relate to and govern all other partnership property in any other goods, chattels, and effects whatsoever.

Of the employment of the ship when part owners disagree.

XXI. Part-owners of ships are necessarily in one or the other of two conditions with respect to the management of the common concern; either they have made the management of the ship a subject of an express agreement, or they have left it open to their will, according to the occasion, and as they may agree amongst themselves upon each particular venture. In the one case, the express contract and agreement regulates the rights and duties of the parties, and the law has only to enforce it according to its legal and equitable construction. But in the other case, which frequently occurs where new part-owners are introduced by death, or sale, it becomes necessary for the law to interfere to prevent the wilfulness of one party from injuring the interest of all the others. The rule of law, in case of dissensions amongst part-owners, is this:—that the majority, in value, may employ the ship: but shall give a stipulation, in a sum equal to the value of the shares of the dissentient partners, that they will bring back and restore the ship, or will pay them the value of their shares. (a) Upon each stipulation being given in the proper form, and in the due Admiralty office, the dissentient part-owners are relieved from all expenses of the voyage and outfit on the one part; and, on the other part, are not entitled to a share in the profits of the undertaking; the ship sailing at the charges, risk, and for the profit of the others. But, in order to entitle themselves to this indemnity, the dissentient part-owners must either arrest the ship, in which case the Admiralty detains it, until the stipulation be entered into and delivered; or they must give a formal notice to the other part-owners of their dissent, and then sue upon the equity of the case. For without the arrest of the vessel, or this formal notification of

(a) *Ouston v. Hebden*, 1 Wilson, 101. and see *Abbott on Shipping*, Part I. *passim*.

disent, the other part-owners will be considered by the law as being within the rule with respect to tenants in common; that as all and each have a right to possession, so one of them cannot have an action against the other for any exercise, use, and possession, which does not destroy the common property. But if by any act of a tenant in common, or part-owner of a ship, the common property be destroyed, such part-owner, being a wrongdoer, is liable, like any stranger, to an action of tort. (a)

XXII. Thus, in *Barnardiston v. Chapman*, which was trover for a ship, the main question was, whether the plaintiff, who was tenant in common of one moiety of a ship, could maintain an action of trover against the other tenants in common for taking the ship out of his possession by force, and carrying it away. Upon hearing this case, on a point reserved, Lord King says, in his MSS., "We held, that if one tenant in common of a personal indivisible chattel bring trover against a stranger, if the stranger do not plead the tenancy in common in abatement, he can have no benefit of it in evidence upon the general issue; and that if one tenant in common destroy the said thing in common, the other tenant in common may bring trespass or trover against him; and, therefore, in this case, if the defendants had burnt or destroyed the ship, this action would have been maintainable against them: but where one tenant in common does not destroy the thing in common, but only takes it out of the possession of the others, and carries it away, there no action lies by the other tenant in common; which being the case, we held this action would not lie." Afterwards, he says, the cause was tried again at the Sittings in London, when the facts were more distinctly brought forward. It then appeared that the plaintiff was tenant in common of one moiety of the ship called the *Triton*, and the defendants tenants in common of the other moiety; and the ship being in the possession of the plaintiff, the defendants forcibly took it out of the plaintiff's possession, secreted it from him, so that he knew not where it was carried; changed the name of the ship, which afterwards came into the possession of one Dean, who sent it to Antigua, where the ship sunk, and was entirely lost. And the plaintiff's counsel insisted that the thing in common being thus destroyed, the defendants were to answer for it to the plaintiff. But the defendants' counsel insisted, that one tenant in common is only answerable to the other tenant in common for an actual destruction, to which King, L. C. J., agreed: but left it to the jury, upon the whole cir-

Barnardiston v. Chapman, MS.

If a part-owner destroy the ship, he is subject to an action of trover or trespass.

(a) 4 East. 121, and *Horn v. Gilpin*, Amb. 251.

cumstances of the case, whether, by the defendant's force, the ship was actually taken from the plaintiff, and secreted, and carried out of his power to preserve the ship : and a destruction happening in those circumstances, whether it should not be found to be a destruction by the defendants' means ; which the jury accordingly found, and gave the plaintiff 110*l.* damages ; which being afterwards moved in court, in Michaelmas term following, the court unanimously agreed to the Chief Justice's direction, and would not grant a new trial. (a)

Strelly v. Winson.

XXIII. But upon the principle, that as every part-owner has a right to a possession and use of the chattel, a court of law or equity can give no redress to one part-owner for any consequence merely resulting from the ordinary use of the vessel. This was decided in the case of *Strelly v. Winson*. The circumstances of this case were as follows. (b) There were three part-owners of a ship : one of them refused to fit out the ship for sea ; the others sent her out upon a voyage without his consent, and she was lost. Upon a bill filed in the Court of Chancery, it was decreed that in this case the loss of the ship should be equally borne by all three ; for though one of the partners did not consent to the fitting out of the ship, yet he would have been entitled to one-third part of the freight, and in this court should have had an account of the third part of the profits of that voyage. And so, where one tenant in common receives all the profits, he shall account in this court as bailiff to the other two for two-thirds. But, in case the other two part-owners had applied to the Court of Admiralty, as regularly they ought to have done, that court would have made an order, that upon one part-owner's refusing to navigate the ship, the other two should have liberty to do it alone, and should not have been accountable to the part-owner that refused to join for any part of the profits ; and then, in case the ship had been lost, the whole loss must have rested on those two that sent out the ship. But, in the present case, in regard the third person, who refused to join with the other two, would have been entitled to a share of the profits of the voyage, if any had been made by the ship, he ought to bear his proportion of the loss. *Qui sentit commodum sentire debet et onus*.

The Court of Admiralty has authority to arrest a ship,

XXIV. But although, where there are several part-owners of a ship, the owners of the less shares may arrest the ship in the Court of Admiralty, and compel a security to be given by the

(a) See 4 East. 123. 124, which contains a full note of this case.

(b) 1 Vernon, 297. *Skinner*, 230.

others before they shall be permitted to navigate the ship out of port, yet the Court of Admiralty can do nothing more than detain the ship till a reasonable security be given, and has no authority to *direct a sale*. This was determined in the case of *Ouston v. Hebden*, (a) which was an application to the Court of King's Bench for a prohibition. The defendant, who was a part-owner of the ship Scarborough, having procured a warrant from the Admiralty, and arrested her in port, it appeared that the ship was built at Scarborough; that the builder sold one-third part of her in sixteen parts, retaining the other two-thirds of her to himself; that the whole ship was worth about 500*l.*; that the builder mortgaged his two-thirds, and died; and that his widow and representative sold the same absolutely to Ouston, who was now the master as well as owner of two-thirds; that this sale to Ouston was made without the consent of the other part-owners, and without any security given to them by Ouston; that he, being master and chief part-owner, insisted upon going a voyage against the will of the other part-owners; that he refused to pay them for their shares, (they desiring not to continue any longer part-owners with him,) or to sell the ship, and distribute the money among them in proportion; and the libel in the Admiralty concluded by praying that the ship might be sold, or that they might have such other remedy as the court thought proper. Ouston, in his answer to the libel, alleged that Hebden's share was not worth more than 50*l.*; that the remaining parts were worth 450*l.*; that the other part-owners agreed to his (Ouston's) purchase, and did not insist upon his giving security before the institution of the suit in the Admiralty: He further alleged, that there was no such usage, as set forth in the libel, for the Court of Admiralty to sell the ship; and he insisted that the ship should go the voyage; and suggested, for a prohibition, that the admiral had no jurisdiction in ships in port. Lee, C. J., "Generally speaking, the Court of Admiralty has no jurisdiction of matters or contracts done or made at land: but this particular case must be determined upon the whole case as it appears upon the pleadings. Now, the libel concludes with praying that the ship may be sold, &c. *or that the party libelling may have such other remedy as that court shall think proper*. I have no doubt that the Admiralty has a power in this case to compel a security; for this is a proceeding *in rem*, and not *in personam*; and this jurisdiction has been allowed to that court for the public good, as is confirmed by the case cited from Fitzgibbon, where it is said

upon the application of a part-owner, until security be given by the other part-owners, but not to direct a sale of the ship.

Ouston v. Hebden.

(a) 1 Wilson, 191.

Part-owners.

that courts of law have allowed it. Indeed, the Admiralty has no jurisdiction to compel a sale; and if they should do *that*, you might have a prohibition after sentence, or we may grant a prohibition against selling, or compelling the party to sell, or to buy the shares of the others, which was agreed to, *per totam curiam*; and the rule as to that was made absolute, but as to compelling a security to be given the rule was discharged." (a)

The Court of Admiralty cannot interfere where the shares of the part-owners are not ascertained.

Concurrent jurisdiction of the Court of Chancery.

XXV. This case is considered as having finally settled the law upon the point, that a part-owner may arrest the ship to compel a security, but that the Court of Admiralty has no power to order a sale. This court, indeed, is open all the year round to applications by part-owners to restrain the sailing of ships, without their consent, until security given to the amount of their respective shares; but where the shares are not ascertained, the Court of Admiralty has no jurisdiction; and, in such case, the Court of Chancery will exercise a concurrent jurisdiction by injunction, restraining the sailing of the ship until the share of the party complaining be ascertained, and security given to the amount of it. And, in such cases, the court will refer it to the master to make an inquiry, and settle the security accordingly. (b) But in all such cases the application to the Court of Chancery must be as expeditious as possible; and an injunction was lately refused to restrain the sailing of a ship upon the application of a part-owner, where the ship was in preparation for sailing the following day, and there were no circumstances to account for the delay in the application. (c)

Part-owners may at all times alienate their interests.

XXVI. It seems scarcely necessary to say, that a part-owner of a ship may part with his interest to another person at any time. "A rule (says an excellent writer,) better adapted to the present state of commerce than that which formerly prevailed amongst some of the nations of the continent, and which did not permit the sale of a ship until after a possession of three or more years; or, at least not till after the performance of one voyage, at the charge and risk of the part-owners." (d) The old rule appears to have been framed with a view to the interest of the master, who, in former times, was a principal owner, and was the person who, with the pecuniary assistance of the other owners, generally caused the ship to be built in the expectation of being employed in the command; and

(a) 1 Wilson, 103. See, likewise, Roll. Abr. 530. 1 Lord Raymond, 623. Fitz. 190.

(b) Haly v. Goodson and Another, 2 Merivale, 77.

(c) Christie v. Craig, 2 Merivale, 137.

(d) Abbott, 97; and Molloy, B. & C. i. sect. 3.

expectation that might be defeated, if others could sell their shares to strangers who, acquiring a majority of interests, might appoint a friend of their own.

Part-owners.

XXVII. We have already shewn that there is no such thing as an equitable title to ships; that the registry acts are unyielding forms, from which the law never departs; deeming always that the paramount interest of the public good requires such certificates, and that the most effectual means of securing compliance with these acts is the penalty of invalidating all purchases and contracts in which they are not observed. The registry acts are always a necessary part of every title to a vessel. A part-owner, therefore, being a proprietor, must be registered as such, or the law does not recognize him as a proprietor. Unless he be a registered owner, he can have no title to the ship or her earnings; and if he brings any action, or files any bill for accounts or profits, it will be a sufficient answer on the part of the defendant, that his name is not included in the ship's register. (a)

Part-owners must have their names inserted in the ship's registry.

XXVIII. It may produce some practical benefit to collect under one head what should be done by the purchasers of shares of ships for the due security of their property. Where such part of a ship is purchased, the ship is either absent or present at the time. If the ship be in her port, the bill of sale, together with the certificate of registry, should be taken to the registry officer of the ship's port, and the purchaser should require such officer to perform the three acts directed by the 4 Geo. 4. c. 41., that is to say, 1. To enter the bill of sale and the particulars in the book of registries. 2. To indorse the same on the ship's certificate of registry. 3. To indorse upon the bill of sale itself, that such entry has been made in the book of registry, and that such indorsement has been completed upon the ship's certificate of registry. If the ship be absent, the bill of sale should still be immediately carried to the officers of registry of the ship's port, and an entry made in the book of registers. Upon the return of the ship, and within thirty days, if possible, after such return, (if not, with the least loss of time,) the certificate of registry should be procured from the master, and taken to the officers of registry, that the due indorsement may be made. If the master, or any other person whatever, refuse to deliver the ship's certificate for the purpose of this indorsement, they are subjected to heavy fines under the new registry act; and in the case of any person absconding with the certificate of registry, or of its being

What part-owners are bound to do, to secure their shares.

(a) *Camden v. Anderson*, 5 T. R. 248. And see *ante*, chapter on the Registry Acts, where all the cases are collected.
109. *Ex parte Yallop*, 15 Vesey, 60.
Stringer v. Murray, 2 Barn. and Ald.

Part-owners.

lost or mislaid, the commissioners of customs are authorised to grant further time, or an entire registry *de novo*. (a)

Wright v.
Hunter.

One part-
owner may
bind another
for things ne-
cessary to the
ship.

XXIX. Part-owners have an interest in the ship in common, and a dominion for each of their distinct parts. Upon the first part of this principle, if a part-owner order any necessary repairs of a ship, or provide her with necessaries, his partners are thereby liable, in common with himself, to an action for the price of them. (b) Thus in *Wright v. Hunter*.—The plaintiff, together with several others, were partners in a ship, the plaintiff having a certain share to himself, and the defendants, and the other partners, holding the remaining shares in conjunction. Debts were incurred on the partnership account; a balance was struck, and the plaintiff paid his adjusted proportion of such debts into the hands of the defendant and the other partners, who were the managing owners, in order that it might be by them paid over to the ship's creditors. They did not do so, and the plaintiff had accordingly to pay the money over again to those creditors. Upon this he brought his action against the defendant, one of his former partners and part-owners in the ship. An objection was started, that the defendant was at most liable only for a proportion of the sum. But Lord Kenyon said, "that there was no foundation for it. That between a creditor and the partners (and the plaintiff having paid the debt was a creditor,) all are liable for the whole debt; though, as between the partners themselves, each is only answerable for his respective share; and the plaintiff was here in the relation of a creditor to the other three partners, because he had paid the defendant after the bankruptcy, and the severance of the partnership."

One part-
owner cannot
bind another
for things not
necessary for
the ship.

XXX. Upon the second part of the principle above stated, namely, that each part-owner has a dominion as to his distinct part, one part-owner cannot bind another for things not necessary for the ship. Thus, for example, one part-owner cannot oblige another to pay any part of a premium of insurance, ordered without his privity. (c) But if such part-owners have a relation of actual partnership superinduced over their other relation as part-owners of the vessel, they manifestly come under the rule of partnership; and, of course, the act of one binds all the others, not indeed as part-owners, but as partners. The case of *Hooper v. Lusby* is here an important case in point as recognizing, very explicitly, the distinction between part-owners and partners. (d) This was an action by insurance-brokers, in London, to recover

Hooper v.
Lusby.

(a) 4 Geo. 4. c. 41. s. 35, 36 and 37.

(b) *Wright v. Hunter*, 1 East. 21.

(c) *French v. Backhouse*, 2787.

(d) 4 Camp. 66.

the premiums and commission upon the effecting of several policies of insurance for the defendants, merchants, at Great Grimsby. It was proved that the defendants were members of a commercial company, which carried on business under the firm of Garniss, Corden, Burringham, and Co.; and that the policies in question were effected in consequence of a letter written by one of the defendants, in the name of the firm, ordering insurance to be done "on account of the company," on two ships called the Commerce and the Christiana. On the part of the defendant it was insisted, on the authority of *French v. Backhouse*, 5 Burr. 2727., that this action could not be maintained. The defendants were part-owners of the ships insured, having separate shares in them. Therefore, one had no authority to insure for the others. Lord Ellenborough said, that one part-owner, even if he be ship's husband, has no implied authority to insure for the others. The distinction was between part-owners and partners. "According to the evidence, the defendants carried on business together in partnership, under the firm of Garniss, Corden, Burringham, and Co., and the insurances were ordered in the name, and on account, of the firm. Had there been any case holding that the defendants, under these circumstances, were not jointly liable, I should have been very much inclined to over-rule it: but the authority referred to is not in point." A verdict was found for the plaintiff. (a)

XXXI. Another principle is, that as part-owners are very frequently in the relationship of dormant partners; so, if a person giving credit to one of them for *necessaries* for the vessel, does not know at the time that there are other part-owners, he *may* sue him alone from whom he receives the orders. (b) Or he may sue *all* who have a beneficial interest in the property of the ship. But mortgagees out of possession have never been deemed liable; and are now expressly protected by 4 Geo. 4. c. 41. ss. 43, 44.

Of dormant partners.

XXXII. If one part-owner become a bankrupt, and the other part-owners have previously paid the expense of the outfit of a vessel at that time on her voyage, they may deduct such expense

(a) See the case of *Bell v. Humphries*, 2 Starkie, 345, in which Lord Ellenborough held, that a managing owner, and a part-owner, could not bind another part-owner by effecting an insurance on the ship without his authority. "Managing owners, (said his Lordship,) had a right to order every thing to be done which was ne-

cessary for the ship: but a share in a ship was the distinct property of each individual part-owner, whose business it was to protect it by insurance; and the insurance of another could not be binding upon such proprietors without some evidence importing an authority by them."

(b) *Abbott*, 97.

from his share of the profits payable to the assignees. The case of *Smith v. De Silva* (a) was taken out of this principle, by the circumstance of the agent, employed by the three partners to provide the vessel, having taken from the bankrupt a promissory note to himself for his share of the outfit. Upon the principle of his having made the debt his own by taking such note, it was determined that the full share of the profits should be paid to the assignees of the bankrupt, and that the other partners (who had paid two-thirds of the amount of the bankrupt's notes to the ship's husband,) could not deduct it from the bankrupt's share of the profit.

XXXIII. If any difficulty or dispute, as to the ship's accounts, arise amongst part-owners, the ordinary remedy is by application to a court of equity. In *Robinson v. Thomson*, (b) it was decided by the Court of Chancery, that an account of the profits of a voyage settled by the major part of the part-owners should conclude the remaining minority. But if they have entered into a written agreement amongst each other, by which one of them is appointed to manage the ship, as the husband, and to render an account, upon the conclusion of every voyage, of the profit and expense; such husband is bound to one and all of them to produce such an account within a reasonable time; and each may have his action against him at *common law* for a breach of the agreement. (c).

Part-owners
should join in
actions relating
to the ship
and its concerns.

XXXIV. In the dealing of part-owners with strangers for the concern of the ship, they make in law, like joint-tenants, but one owner; and, therefore, in the case of any injury to the ship, they should join in one action at law. But if any single part-owner should bring an action for a damage to the vessel, the defendant must plead this circumstance of a tenancy in common in abatement; otherwise the plaintiff may recover damages proportionable to his interest in the vessel. (d) But in an action on the case in the form of tort against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, it has been determined in the Court of Common Pleas, (contrary to a decision in K. B.) that the defendant may plead in abatement that the goods were delivered to him and his partners jointly, and that his partners are not sued. (e) So, if one of two part-owners of a chattel sue alone for a tort, and the defendant do not plead in abatement, the other part-owner

(a) Cowper, 469.

(b) 1 Vern. 465.

(c) *Owston v. Ogle*, 13 East, 538.

(d) *Addison v. Overend*; 6 T. R. 766.

(e) *Powell v. Layton*, 2 N. B. 365.
sed quare; and see post.

may afterwards sue alone, and the defendant cannot plead in abatement in such action. (a) But in an action for the freight of a vessel, shared in parts, such freight being in every respect a partnership property, all the part-owners ought to join; or the defendant may, in most cases, avail himself of the objection, as ground of nonsuit, at the trial. The distinction is here between torts and contracts; all contracts with such parties necessarily being entire, and, therefore, with respect to all and each, constituting but one claim and right of action. With respect to part-owners, indeed, it should be constantly remembered that, as regards the vessel and its concerns, they are for the most purposes partners; and upon this principle it was determined by Lord Eldon in *ex parte Christie*, (b) that the master of a ship having become bankrupt, the owners being indebted to him for the concerns of the ship, whilst he also was indebted to some of them generally on distinct concerns, that the latter should not set off their several demands against the claim of his assignees for their shares of the general debt.

Part-owners.

XXXV. But though part-owners want some of the artificial constituents of joint-tenancy, or in other words, of partnership, (such as holding their respective shares by several titles, and not by one,) the law, following the equity and manifest analogy of their character with partners in the greater number of cases, considers them in most instances as partners, and under this view generally both gives them the rights, and exacts from them the duties. Upon this principle, an action upon any contract relating to the ship should regularly be brought against all jointly, as *partners* in the ship. But if all are not sued, the defendants can only avail themselves of the objection by plea in abatement; and if they omit to plead such a plea, the plaintiff will recover his whole demand, and the defendants must afterwards call upon the others for contribution. Where the declaration, assuming the form of an action *ex delicto*, alleges a breach of duty, and not a breach of promise, it has been much questioned, whether one part-owner, who is sued alone, can avail himself of this plea, and also whether, if the action be brought against more persons than appear at the trial to be part-owners, the plaintiff can sustain his suit against those who appear to be so, or must fail altogether. In a case of this nature, the Court of King's Bench decided some time ago that the plea was not admissible: (c) but, in another case, the

Of actions brought by, or against part-owners.

(a) *Sedgworth v. Overend*, 7 T. R. 279.

(b) 10 Vesey, 105.

(c) *Govett v. Radnidge*, 3 East. 52.

Court of Common Pleas afterwards held it to be admissible; (a) and following up its own judgment, decided in a third case, that the plaintiff, who had failed in proving all the defendants to be part-owners, must fail altogether. (b) A writ of error was brought on this latter judgment; which was argued before the twelve judges, and it was understood that much difference of opinion existed among them: but the cause was decided on a different ground. (c) In a fourth case, of a similar nature, wherein the declaration expressly alleged a bargain, and complained of a deceitful warranty in the nature of a wrong, the action being against two persons, and the plaintiff proving a sale by one alone; the Court of King's Bench held that he could not succeed against that one, but must wholly fail. (d) But this case is not to be considered as weakening the authority of *Govett v. Radnidge*, or as adopting that of *Powell v. Layton*. For the case of *Weal v. King* was matter of contract merely, and was only *formally* turned into a tort. The question, therefore, still remains undecided.

XXXVI. If a tradesman, who has repaired a ship, take from some of the part-owners sums equivalent to their shares, they still remain responsible for the residue, if not paid by the others, unless at the time of the payment the tradesman specially agree to discharge them from all further demand, upon some good consideration inducing him so to do, such as payment before the expiration of the usual credit; or release them by deed. (e) But where a person, who has furnished a vessel with cordage, takes a bill for the amount from the managing owner, and renews that bill upon its being dishonoured, the other part-owners are discharged. This case proceeds upon the principle that the creditor has made an election, and preferred the single credit of the managing owner to that of the joint partnership. So, likewise, where the party, sued as a partner, for the value of goods furnished for the *owners* of a ship, was neither a partner, in fact, at the time, (having parted with his share some time before,) nor held himself out as such, having before withdrawn his name from the description of the firm at the counting-house, and sent circular letters to the correspondents of the house, notifying the change; he cannot be

(a) *Powell v. Layton*, 2 N. R. 365.

(b) *Max v. Roberts*, 2 N. R. 454.

(c) *Ibid.* in Error, 12 East. 89.

(d) *Weal v. King*, 12 East. 452.
Abbott, 104.

(e) *Teed and Another v. Baring and Others*, before Lord Ellenborough,

C. J., at Guildhall, 1806. See likewise *Reed v. White*, 5 Esp. 122; and Abbott, 105. The case of *Reed v. White* seems to depend upon particular circumstances; and must not be considered as establishing any general rule of law.

charged merely because, having defectively conveyed his whole share in the ship before that time, he had subsequently joined with the assignees of the bankrupt partners in the ship in making a good title to it to a purchaser from the assignees. (a) We have already shewn that if the names of two partners in trade appear (amongst others) in the certificate of registry, as part-owners of a ship, the registry acts do not prevent the shewing how, and in what proportions, the several owners are respectively entitled; and though such part-owners may derive title under different conveyances, yet if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners become bankrupt, these shares will be considered as the joint property. (b)

XXXVII. It has been seen by previous cases that partners in a ship are tenants in common, and not joint tenants, between whom there is no survivorship: but the share of each of them shall go to his executor, and the executor shall join in a writ with them who survive. It has likewise been shewn that, though they have separate interests, all should sue during their joint lives for any cause of action which *concerns* the ship, as for running it down; and if they do not, it may perhaps be a good plea in abatement. (c) So, they are all *bound* to join in an action for any *contract* concerning the ship, as for freight, &c. But whether any one be part-owner of a ship must be determined by the register; for since these acts, as we have before shewn, they whose names appear upon the register can alone have a legal or equitable title to the vessel. (d) Thus, as it has been adjudged by previous cases, if four partners in trade jointly purchase and pay for a ship, but cause her to be registered in the names of two only, the interest cannot be averred in the four in order to maintain an action on a policy of insurance on freight; yet, in general, an equitable interest is sufficient to maintain such an action. So, if a ship be purchased by one partner, and registered in his name only, it will be deemed, in point of law, and even in a court of equity, by reason of the registry acts, as the separate property of that partner, although the purchase and outfit be taken out of the partnership funds, and the earnings placed to the partnership account. (e) But if the names of the part-owners appear on the certificate of registry, the provisions of

(a) *M'Iver v. Humble*, 16 E. R. 169.;
and see *ante*, *Dowson v. Webster*.

(b) *Ex parte Jones and Others*, 4
Maule and Selwyn, 450.; and see *ante*,
4 Geo. 4. c. 41. s. 30.

(c) See *Addison v. Overend*, *ante*.

(d) *Camden v. Anderson*, 5 T. R.
709.; and see *ante*.

(e) *Curtis v. Perry*, 6 Vesey, 759.;
and *ex parte Yallop*, 15 Vesey, 60.

the act of parliament are satisfied ; and it may be shewn by evidence *aliunde* how, and in what proportion, such partners are interested. But where A., B., and C. agreed to purchase a ship, and contracted that it should be registered in the name of A. and B. only, but that the profits of the ship should be divided by the three ; C. filed a bill against A. and B. for an account of the profits of the vessel ; a general demurrer was put in on the ground of public policy : the Vice-Chancellor held, that such an agreement could not be assisted by a court of equity, being in manifest contravention of the express enactments of law, and a design to evade the publicity required by the registry acts. (a)

(a) *Battersby v. Smith*, 3 Wilson, 110.

CHAPTER II.

OF THE MASTER.

THE master of a vessel is the person commissioned to navigate and manage her. In considering this relation, there are three points to which the attention of the Reader must chiefly be directed :—1. The qualification of the master, and his authority with respect to the employment of the ship. 2. His authority to bind the owners with respect to repairs, and other necessities furnished to the ship. 3. His duties and responsibility to the owners. The two first heads will constitute the subject of the present Chapter.

I. First, as respects the qualifications of the master and seamen, they fall under the navigation laws, and have been previously stated and explained in a former part of this Work. (a) It will be sufficient, therefore, to repeat them summarily, in this place. Every vessel employed as a British vessel, in the trade of Great Britain, must be navigated by a master, and three-fourths of the mariners at least, British subjects. But the King by his proclamation, during war, may permit merchant ships and privateers to be manned with foreign mariners, in the proportion of three-fourths of the proper quota for navigating such vessels. The qualifications of the master and mariners are chiefly contained in the 34 Geo. 3. c. 68., which has been left unrepealed, as regards these qualifications, though that part of it has been repealed (by 4 Geo. 4. c. 41.) which relates to transfers, and the certificate of registry. The enactments under this act *generally* require the master and mariners to be British subjects, except in the five following instances :—1. By proclamation during war time. 2. In the case of negroes and lascars, employed in the navigation of the seas of America and the West Indies ; or in the seas to the eastward of the Cape of Good Hope. (b) 3. East India ships, manned

Of the qualification of the master and mariners.

Exceptions to the usual qualification of master and mariners.

(a) See *ante*, Part I. Chap. I. (b) 34 Geo. 3. c. 68. and 42 Geo. 3. c. 61.

with lascars, are deemed legally navigated, if there be seven British seamen to every hundred tons. (a) 4. If a sufficient number of British seamen cannot be procured by the East India Company in the East Indies, or by any ship sailing under their licence, or legally trading by the late act, for their voyage to Europe, the governments there are empowered to grant licences to such ships to sail with a less proportion of British seamen than is required by law. (b) 5. And in the case of any ships employed in trade only between the ports and places within the limits of the company's charter, including the Cape of Good Hope, such ships may be manned and navigated *wholly* by lascars, or any Asiatic sailors. It may, perhaps, be termed a sixth exception, that foreign sailors and mariners, serving three years on board British ships of war, are to be deemed British subjects; and, upon due certificates of good behaviour from the commanding officer on board the vessel in which they have served, may be employed as masters or mariners of British ships, and are holden to be within the meaning of the navigation laws as British seamen. But any merchant who employs them must be careful of two points: in the first place, that they have such certificate; and, secondly, that they have taken the oath of allegiance to his Majesty before some justice of the peace, or officer of his Majesty's customs, in any of the ports of the King's dominions. (c)

It should, likewise, be particularly observed under this head of the qualification of the masters and seamen, that any person, whether British or alien, who shall take an oath of allegiance to a foreign state, thereby loses his qualification of being regarded as a British subject, by birth or service, unless such oath, in the case of an alien, have been taken before his qualification by service to be a British master or seaman, or, unless being a British subject, he shall have taken it under the terms of some capitulation, upon the conquest of any of the dominions of his Majesty by the enemy, and for the purpose of obtaining the benefit of such capitulation only. But as owners in many cases may be ignorant of their masters and mariners having taken such oath it is provided that a ship shall not be forfeited, if the owners can make it appear that they were ignorant of such disqualifying circumstance. (d)

Such, therefore, are the qualifications required by law, as respects the master and mariners of British ships.

(a) 55 Geo. 3. c. 116.

(c) 34 Geo. 3. 68.; and 42 Geo. 3.

(b) 55 Geo. 3. c. 116. See 53 Geo. 3.

c. 61.

c. 155., and East India Free Trade Consolidation Act, 4 Geo. 4. c. 80.

(d) 34 Geo. 3. c. 68.; and 42 Geo. 3. c. 61.

II. The authority of the master, with regard to the employment of the ship, is a more ample head, and requires a fuller explanation.

Of the master, &c.

The master of a ship is necessarily in one or other of two relations: he is either a part-owner, to whom his co-partners have trusted the government and management of their common property; or he is the mere captain, in which case he is the confidential servant or agent of the owners at large. In both cases, the general rule is, that the owners are bound to the performance of every lawful contract made by him relative to the usual employment of the ship. Being, however, not only the representative of the owners, but being himself, when in foreign and remote parts, the only person visible and known, the law, acting upon this circumstance, makes him responsible, not only as agent, but answerable as for his own contract. The principle of this rule is manifest. It would be of inconceivable mischief, and an impediment in commercial dealing, if a foreign merchant, making a contract of freight with the master, should be compelled for any consequential injury to seek out the owners. The law, therefore, in order to avoid this inconvenience, gives all who deal or contract with the master the two-fold remedy, that they may proceed against either or both. (a)

Of the authority of the master, as regards the employment of the ship.

III. The master and owner, therefore, being to each other in the relation of master and servant, or principal and agent, if goods be lost, injured, &c. by the wilfulness or negligence of the master, the owners are liable; being necessarily in a better condition of knowing the skill, honesty, and trust-worthiness of their servants, than those who only casually employ them; and having, moreover, the profit and price of the freight of the ship.

IV. But the owners are liable only for such contracts of the master as he shall make in the necessary and usual employment of the ship, or for such acts as he shall do belonging to his character as master within this limit. And, therefore, in the case of *Boucher v. Lawson*, (b) it was decided by Lord Hardwicke and the Court of King's Bench, that the owner was not liable for the act of the master, such act not belonging to his character of master; and, therefore, not to be presumed within their express or implied consent. The case was this:—The master had received some Portugal coin, to convey from Lisbon to London; and, according to custom in these cases, the price of such conveyance

Boucher v. Lawson.

(a) 1 *Boson v. Sandford*, Carthew, 238.; and Abbott, 115.

63. *Morse v. Sluce*, 1 Ventris. 190. (b) *Rep. temp. Hardwicke*, 85.

was his own perquisite. He embezzled the coin, and an action was brought by the proprietor against the owners to recover the value. The court decided, that if the vessel had been carrying goods upon hire, the circumstance of the price of carrying coin being a perquisite of the captain would not vary the liability of the owners, as it would make no difference in the equity of the case, whether the master received such price under the name of wages or perquisite. But in the case before them it did not appear that the vessel was so employed; it was, therefore, a mere private act of the captain, and, therefore, not within the ordinary presumption of the law, so as to make the owners responsible.

In explanation of this principle, Lord Kenyon said, in another case, (a) "The defendants (owners) are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his conduct in those things that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of his voyage."

Of the authority of the master as regards the employment of the ship.

V. But as the owners are bound by the act of the master, under the presumption of law that he is their agent and authorized servant; so if the owners appear in their own persons, and make a special contract for the employment of their ship, the master, of course, cannot annul such a contract, and substitute another for it. The principle here is, that *expressum facit cessare tacitum*; and the appearance of the principals in their own person supersedes the discretionary act of their agent. In *Burgon v. Sharpe and Others*, (b) where this was the precise point before the Court, Lord Ellenborough said, that the captain was captain for the voyage originally agreed upon by the owners; and, being employed only upon that express voyage, every thing beyond the voyage was beyond the scope of his authority as captain. As such, he had no power to change that voyage for another. His Lordship however added, "the person who is entrusted with the command of a ship *may* be vested with a complete controul as to her employment and destination: but this is superinduced upon his authority as captain."

Burgon v. Sharpe.

In all such cases, however, the court will give particular attention, not only to the general authority of masters by the practice of merchants: but, still more strongly, to any express and particular contract, which may have been made between the master

(a) *Ellis v. Turner*, 8 T. R. 531.

(b) 3 Campb. 529.

and his owners. So in *Dewell v. Moxon* and Another, (a) one of the questions before the court being, whether the captain of a vessel, sent to earn freight, had authority to carry a cargo, freight free; it was collaterally decided, that he had no such authority.

Of the master, &c.

Dewell v. Moxon.

VI. The two contracts under which merchant ships are ordinarily employed are *charter-parties*, and *contracts for freight* with one or more persons unconnected with each other. These contracts will be the subject of the last part of this Treatise. In *charter-parties*, the whole vessel is ordinarily let out for a determinate voyage to one or more places, and the instrument by which it is so let is termed the *charter-party*. This is most commonly the sole act of the owners themselves. In contracts for freight, the master and owners, or the master singly, take goods on board to convey them to the place of the ship's destination. Both of these contracts may be made singly by the master himself. In freight, this often happens. In *charter-parties*, when the vessel is in a foreign port, it sometimes occurs. As respects such *charter-parties*, the law of England will not hold the owner to be bound by the *instrument* itself, if he be no party to it: but if it be made by the master in a foreign port, in the usual course of the ship's employment, the ship and freight are bound, in their full value, to the performance of such covenant. And it is stated in a learned work, and we think very justly, that the owners may be made responsible either by a special action on the case at the common law, or by a suit in equity, for the faithful performance of the stipulations of a *charter-party* made by the master, under the circumstances before-mentioned. (b)

Of *charter-parties* made by the master.

VII. This point has been expressly decided, since the last edition of this Work, in the case of *Leslie v. Wilson*, (c) which it will be necessary to state in some detail. This was an action on the case, in which the plaintiff declared, that at the request of the defendants, he shipped and put on board a vessel of the defendants' certain boxes of oranges, to be safely and securely carried and conveyed by them in such vessel from St. Michael's to London; and that it therefore became the duty of the defendants, as owners of such vessel, safely and securely to carry and convey the said goods, and, for that purpose, to prepare and provide all things necessary in that behalf, and (amongst other things) to procure a proper and skilful master

Of *charter-parties*, under seal, made by the master.

(a) *Dewell v. Moxon*, 1 Taunt. 392.

(c) 3 Brod. and Bingh. 171.

(b) Abbott, p. 119.

Of the master, &c.

Leslie v. Wilson.

Of charter-parties, under seal, made by the master.

or captain, for the purpose of conveying the goods with safety and security. The breach was then charged, that the defendants, not regarding their duty as owners, did not safely and securely carry and convey the goods, nor, as owners, procure a proper or skilful master or captain, but therein wholly made default; and, on the contrary, employed an unskilful and improper master or captain, by and through whose misconduct, carelessness, and negligence, the arrival of the vessel at her port of destination was delayed, and the goods so laden on board the vessel were damaged, rotten, and destroyed. The second count was more general. The defendants pleaded that they were not guilty. The cause was tried at Guildhall, before Dallas, C. J. after Michaelmas term, 1820, when the jury found a verdict for the plaintiff: but the importance and alleged novelty of the point induced his Lordship to reserve it for the opinion of the court whether the action was maintainable or not. The court directed the facts to be turned into a case; and they were stated as follows. That the plaintiff was an orange merchant at St. Michael's; that the defendants were owners of the ship *Eliza and Jane*; that the plaintiff shipped the oranges under a bill of lading, stating one of the defendants (*Jenking*) to be master for that voyage. This bill of lading was signed by the defendant, *Jenking*. The case then stated a charter-party of affreightment between the said *Joseph Jenking*, commander of the vessel of the one part, and *John Adam and James Leslie*, (the plaintiff) freighters of the said vessel of the other part, by which the commander agreed with the freighters, that the schooner being tight, staunch, and every way properly fitted, victualled, and manned, as is usual for vessels in merchants' service, he the commander, or some other proper person in his stead, should immediately receive on board from the freighters or their agents the goods in question; and being dispatched therewith, on or before the 5th of October then next, should with all possible speed set sail to St. Michael's, make a true delivery of the goods, and there receive on board such quantity of fruit as the agents or assigns of the freighters should think fit to load, &c. &c. It is not necessary to state more of the instrument, which was under the hands and seals of *Jenking, Adam, and Leslie*. The case stated the arrival of the ship at St. Michael's; that the cargo of oranges was put on board; and the ship made ready for sea; that the plaintiff *Leslie* requested *Jenking* to provision the ship; that he neglected to do it; and the facts stated in the case shewed the grossest neglect of duty in the master, by means of which the voyage was so delayed, that the vessel, which

might have arrived in the month of March, did not arrive till the 5th of May, by reason of which the cargo of oranges was much damaged. The case was argued several times by the counsel for the plaintiff and the defendant; and in Michaelmas term 1821, Dallas, C. J. delivered judgment. His Lordship stated the pleadings and case, as above set forth, and proceeded as follows:—
“On these facts we are of opinion that the action was properly brought. The owners of a ship, for whose benefit she is navigated, are bound by the maritime law to the owners of goods, shipped and received on board to be carried, for the due carriage thereof, and are liable for any negligence on the part of themselves or their servants, whereby the goods may be damaged. If, without fraud, and in the due course of the ship's employment, the master makes a charter-party, the ship-owners are not thereby divested of liability; but are still liable for the performance of such duties, belonging to them in that character, as are not inconsistent with the stipulations of the charter-party. And, whether the charter-party be made under the seal of the master, or not, seems to make no difference in this respect; because the ship-owners are not charged directly upon the contract of charter-party, but upon their general liability, as principals in the adventure (deriving profit from the ship's employment) for the performance of such duties as belong to them in that character, and are not inconsistent with the charter-party. A special action on the case, like the present, seems to us to be a proper form of action for recovery of damages for the breach of such duties.

Of the master, &c.

Leslie v. Wilson.

VIII. Such, therefore, is the authority of the master, with respect to the employment of the ship; and within such limits may he undertake to employ the vessel upon his own discretion, and may bind the owners to execute his lawful contracts, whether under seal or otherwise.

IX. *Secondly*, The authority of the master, as regards the victualling, repairing, and providing the ship with all necessaries, has a still larger extent and more important consequences. It, therefore, requires a more exact and detailed exposition and statement.

Of the authority of the master to order repairs and necessaries for the ship.

X. As the master is the agent and servant of the owners, and a ship is manifestly a chattel of such a nature as to require repairs and necessaries in places remote from the residence of the owners, and by persons to whom they are totally unknown, it is a natural, and indeed, a necessary presumption of law, that the master has their implied consent to order such repairs, and to provide such necessaries. Under his relation of being agent and servant to the

owners in all that is necessary for the ship; the law authorizes him to do such necessary acts, and to enter into such necessary contracts, and holds the owners to be bound by such acts and contracts of the master. Under his relation of being the only ostensible person, with regard to those whom he employs, the law makes him likewise liable in his own person for such necessities and repairs, and sends him (if a part-owner as well as master,) to his co-partners for contribution; or if only an agent, to his principal for re-payment.

Of the authority of the master to order repairs and necessities for the ship.

XI. With regard to such repairs and necessities, therefore, the general rule is, that, in all *necessary* provisioning and repairs made by order of the master, he is himself, in the first place, personally liable; and, secondly, that the owners are liable with him. All who deal with him for such *necessaries* have their election of three remedies,—*first*, To sue the master;—*secondly*, To sue the owners; and, *thirdly*, (in the case of hypothecation by the master of the ship for necessary repairs, when in the course of a foreign voyage,) a process against the ship in *specie* in the Courts of Admiralty.

XII. But as the master is liable only as the ostensible servant and agent of the owners; so where the owners appear in their own persons, and the credit is manifestly given to them only, the master is not liable, such case not being within the reason of the rule. In the case of *Farmer v. Davis* (a) the goods were ordered by the owners before the captain was appointed to the ship. Some of the goods were delivered before he was commissioned: but others of the parcel were delivered afterwards. The question, therefore, for the court was, whether the master was liable for all the goods provided,—or so much of them as was delivered after his appointment, or was liable at all.—Lord MANSFIELD said, “Where a captain contracts for the use of the ship, the credit is given to him in respect of his contract. It is given to the owner, because the contract is on their account. Therefore, in general, the tradesman who gives that credit, debits both the captain and the owners. Now, what is this case? The captains made no contract personally. The owners contracted for their ship; the credit was given to them only; and there is not a shadow of colour to charge the captain for any part of these goods.”

XIII. But where the master is in the exercise of his actual appointment, the law regards him as so completely the agent and confidential servant of the owners, that if he buy necessities for the ship, and do not pay for them, the owners are responsible to the vendor, though the owners may have *expressly* given the master

(a) 1 T. R. 108.

money for the victualling of the ship. This is upon the ordinary principle of the law of master and servants. (a)

Of the master, &c.
Liability of the owner to the master's contracts confined to contracts for necessities only.

XIV. In *Yates v. Hall*, (to which we shall have to refer more fully for another point,) the court said, "If the master borrow money to repair or victual the ship, (or of course, order such provisioning and repairs) when there is no occasion for it, he alone is debtor, and not the owners." The owner's liability to the master's contracts is, therefore, confined to the case of necessary repairs, provisioning, and appointments. If any one trusts him for a thing not necessary, he trusts him beyond his commission and authority, and consequently cannot charge his owner. He cannot take up money for his own use, or pledge the ship, or his owner's credit, for his own debt. (b) This doctrine is upheld by a series of decisions in our courts of equity and law from very early times. In *Speering and Others v. Degrave and Others*, (c) the master having bought provisions upon credit, and failed, and the tradesmen suing in consequence the part-owners, the Court of Chancery held them liable, and decreed that they should pay in the proportion of their shares. The master, the court said, was but the servant of the owners; and it was nothing that they had paid the money to him, if he had not paid it over to the creditors. And in *Garnam v. Bennet*, (d) the court repeated, in substance, the same rule; saying, that the repairer of a ship has his election to sue the master, who employs him, or the owners: but if he undertakes the repairs on a special promise from either, the other is discharged. This rule, indeed, that the owners are liable for all necessary repairs and provisioning ordered by the master, is now so established by repeated decisions, that it is unnecessary to confirm it by any additional cases. There is one case, however, of recent occurrence, which cannot be passed over.

XV. The plaintiffs were brass-founders at Liverpool; (e) and the action was brought to recover the amount of their bill for coppering a ship, of which the defendants, who resided at Ipswich, were owners. In September, 1819, the vessel was at Liverpool, bound on a voyage to Newfoundland and the Mediterranean. The captain of the ship ordered the plaintiffs to copper her; and it was proved that, although it was *extremely useful* to copper vessels bound to the Mediterranean, it was not *absolutely necessary*; for many

Webster v. Seekamp.

What shall be deemed necessities for a ship.

(a) 2 Vern. 943; and Com. Dig. title Navigation, 119.

(b) 1 T. R. 73.

(c) 2 Vern. 643.

(d) 2 Str. 816.

(e) *Webster v. Seekamp*, 4 Barn. & Ald. 352.

What shall be
deemed neces-
saries for a
ship.

Webster v. Sec-
kemp.

vessels went to the Mediterranean without being coppered. At the trial, it was contended that the owner of a ship was liable only for contracts made by the captain in respect of stores, or repairs, that were *absolutely* necessary; and, therefore, that the defendants in this case were not liable. The learned judge left it to the jury to say, whether the coppering was useful and proper for a vessel about to proceed on a voyage to Newfoundland and the Mediterranean; and whether it were that which a prudent owner himself, if present, would have ordered. The jury found that it was, and the plaintiff obtained a verdict. A rule nisi for a new trial having been obtained, it was contended that the owners were liable for any *necessary* supplies furnished, or repairs done by the master's order. Abbott on Shipping, 4th ed. p. 127. The term *necessary* meant what was reasonably fit and proper for the occasion. So, also, an infant is liable for necessaries, which means such things as are suitable to his degree, estate, and condition; for that is the language of the replication to the plea of infancy. It was contended that the question left to the jury was, whether the supplies furnished were such as a prudent owner, if present, would have ordered. The true question, however, was, whether they were *absolutely* necessary; and Cary v. White, 5 Brown's Parl. Ca. 325. is an authority to shew that the liability of the owner depends upon that fact. Abbott, C. J. said, the general rule is, that the master may bind his owners for necessary repairs done, or supplies provided for the ship. It was contended at the trial, that this liability of the owners was confined to what was *absolutely* necessary. I think that rule too narrow; for it would be extremely difficult to decide, and often impossible, in many cases, what is *absolutely* necessary. If, however, the jury are to enquire only what is necessary, there is no better rule to ascertain that, than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of opinion, that whatever is fit and proper for the service in which a vessel is engaged; whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term, "*necessary*," as applied to those repairs done, or things provided for the ship by order of the master, for which the owners are liable. I think, therefore, that the question in the case was properly left to the jury, and that this rule ought to be discharged." Bayley, J. "The captain of a ship, as agent for the owners, has a general authority to act for them. They ought not to appoint a man upon whose compliance with their orders, and on whose prudence

and discretion, they cannot rely. The owners are responsible for any thing ordered by him for the ship within the scope of his general authority. Now, I think it is within the scope of his authority to order such repairs or supplies as it may reasonably be supposed that the owners, if they had had an opportunity of deciding for themselves, would have ordered; and I, therefore, think that this rule should be discharged."

XVI. Nor does the rule suffer any alteration, whether the master shall have ordered such necessities, or borrowed the money to provide them, at home or *abroad*, provided the necessity be *proved*. Where the amount is considerable, and the place of the contract abroad, the more usual mode, indeed, is to borrow the money on the ship. And it has been said by the Lord Chancellor, that if in a foreign port a loan of money is necessary to enable the master of a ship to prosecute his voyage, a person making that advance is perhaps entitled to a lien on the ship, *without an instrument of hypothecation*. (a) But if the master finds it more convenient to borrow money by personal contract, he may adopt this method, and the court will hold his owners liable. Thus, in *Evans v. Williams*, (b) where the master had borrowed the money for the necessities of the ship abroad, on his own contract, and gave in evidence (though not necessary to the case,) that he could not have obtained the money on the security of the ship, Lord Kenyon held, that the owners were of course liable; and that the lender might recover from them.

Master may order such necessities *abroad*, as well as at home, and thereby equally bind his owners personally.

Master may borrow money in a foreign port, and make his owners liable, provided the money be absolutely necessary for the use of the vessel.

As the master has this right to bind the owners by his contracts for necessities with others; *a fortiori*, if he pay for such necessities himself, he may call upon them to repay him. But as the law entertains a very just jealousy of this species of contracts, in which the same person at once incurs and admits his *own* account, those who are in such circumstances should be prepared to prove by the most direct evidence the absolute necessity of such victualing or repairs.

In *Rocher v. Busher*, (c) the plaintiff, a merchant at Oporto, claimed the amount of goods and money supplied to the master of the defendant's vessel, at Oporto, for the use of the ship. The counsel for the defendant admitted the liability of the master for necessities supplied for the use of the ship: but contended that he was not equally liable for monies supplied to the captain to be subsequently appropriated by him; and denied that the monies

Rocher v. Busher.

(a) *Ex parte Halkett*, 2 Rose 194. v. White, 1 Br. Parl. Cases, 284.
and Ves. and Beam. 13.

(c) 1 Stark. 27.

(b) *Abbott*, 128. See likewise *Cary*

had been expended in the use of the ship. But the master being himself called, and giving evidence that certain sums had been so applied, Lord ELLENBOROUGH said, "In strictness, a claim of this kind is limited to articles supplied through necessity. But where the same necessity exists, money may be supplied as well as goods, and the amount recovered. This, however, must not be understood of an indefinite supply of cash, which the master may dissipate: but only such as is warranted by the exigency of the case, as for the *payment of duties, and other necessary purposes*. I once held, that proof of the strict application of the money to the purposes of the ship was necessary; and Mr. Justice Heath, sitting for the Chief Justice of the Common Pleas, did the same. But I cannot advise the Jury to find more than they may deem *absolutely necessary* for the use of the vessel." (a) And in *Palmer v. Gooch*, Abbott, L. C. J., ruled, that in an action against the owner of a ship for money supplied to the captain in a foreign port, it was not sufficient to prove the advance of a much larger sum than was necessary for the use of the ship, and an application of *part* of that sum to such uses, the residue being placed to the private account of the captain, but that it was essential to prove the advance of a specific sum; and that such sum was necessary for the use of the ship, and was so applied in fact. (b)

*Palmer v.
Gooch.*

XVII. But though the owners be liable for necessities furnished to the ship, and money advanced to the master to purchase such necessities, so far, and to such an amount, as the strict appropriation of the money supplied can be proved, the obligation is not so specific and ascertained as to supersede the right of the owners to examine the accounts, and to enquire into the necessity; and it has, therefore, been decided upon this principle, that the owner is not bound to honour a bill of exchange drawn by the master in a foreign port for money so supplied to him. In *Harder v. Brotherstone*, (c) the first count in the declaration stated that the plaintiff carried on business as a merchant, at Pernau, in Russia; that the defendant's ship being at that place, a sum of money was necessarily wanted for her use; that thereupon, in consideration that the plaintiff would advance this money, the defendant undertook that a bill of exchange, to be drawn as a

*Harder v.
Brotherstone.*

(a) In this case it was held that the captain was a competent witness to prove the money advanced, and the necessity of the supply—See *Evans v. Williams*, 7 T. R. 481. n. The captain, indeed, is an admissible witness,

not on the ground of *necessity*, but on the ground that he stands *indifferent* between the parties.

(b) 2 Starkie, 428.

(c) 4 Campb. 254.

security for the amount by the master of the ship on one William Sharples, at Liverpool, should be duly honoured; that the plaintiff did accordingly advance the amount, but Sharples refused to accept or pay the bill. Gibbs, C. J., stated, "That he was clearly of opinion that there was no implied undertaking on the part of the owner of a ship, that a bill of exchange, drawn by the master on a *third person*, for money advanced for the ship's use abroad, should be duly honoured." So, if the master draw upon his owners for such necessities, it should seem they would be under no obligation to accept the bill. They would, indeed, be liable to the debt the moment it is contracted: but in collateral obligations of this kind, as between master and servant, principal and agent, &c. it is totally a different thing to be liable to an account, after examination and proof, and to be subject to the instant acceptance of a bill of exchange before such account is ascertained and approved.

XVIII. As sometimes the owners of a vessel employ a supercargo, the contracts which are made by an agent of this description are equally binding with those which the master makes within the scope of his authority. Therefore in *Mitchell v. Glennie*, it was ruled by Lord Ellenborough, that the owner of a ship was liable for stores and necessities supplied by the order of a supercargo, after the detention and liberation of the vessel by a foreign power, although the supplies were furnished after an abandonment by the owner to the underwriters. (a) So, likewise, the owner of a packet-boat, employed by government, but of which such owner receives the earnings, is liable for the amount of stores furnished for the vessel by the orders of a captain appointed by the post-master general. (b) But the owner of a vessel let to freight for a particular voyage is not liable on the contract of the master for the non-delivery of goods; for the master, under such circumstances, though originally appointed by the owner, must be taken, *pro hac vice*, to be the agent of the freighter only. (c) So likewise, where the defendant bought a ship taken in execution under a *fiery facias*, in 1805; but not having paid the whole of the purchase-money, the sheriff did not execute a regular assignment till 1810. The defendant, however, was immediately put into possession, and got the vessel registered in his own name. In

Exceptions to the general rule, that the owner is bound by the contract of the master.

(a) *Mitchell v. Glennie*, 1 Stark. Crawford, 2 Stra. 1251.

230.

(c) *James v. Jones and Another*,

(b) *Stokes v. Carne and Others*, 3 Esp. 27. S. C., and see *ante*.

2 Campb. 239. And see *Parish v.*

1806, he chartered her to the captain for three years, and interfered no more in the business. Lord Ellenborough held that the defendant was not liable for stores ordered by an agent of the captain during the three years. (a) And the Court of King's Bench refused a rule *nisi* for a new trial, on the ground that the relation of master and owner did not subsist between the captain and the defendant, and that the case of a ship hired for a *definite* period differed from that of a vessel chartered for a *particular* voyage, where the master is always appointed by the owner. (b) And, in another case, where the ship was chartered for a particular voyage only, and was put up by the freighter as a general ship, the registered owners were held not to be liable for a tortious conversion of the plaintiff's goods by the master, in the absence of proof that they were received on board by some person appointed by them. (c)

(a) *Frazer v. Marsh*, 2 Campb. 517.

(b) 13 East. 238.

(c) *Mackenzie v. Rowe and Others*, 2 Campb. 492; and see *ante*. Parish

v. Crawford, 2 Stra. 1256.—More fully reported, Abbott, 22. But this subject will be more fully treated in the Chapter on Freight.

CHAPTER III.

OF THE POWER OF THE MASTER OVER THE SHIP, CARGO, AND FREIGHT, AS TO PLEDGE, OR ALIENATION IN PART OR WHOLE.

In the preceding Chapter we have considered the authority of the master to bind the persons of his owners for the necessities of the ship. The subject of the present Chapter will be, the manner in which the ship, freight, and cargo, may be bound, and the authority of the master to give an obligation upon the ship itself; or, in other words, to hypothecate or alienate the vessel; or to sell or pledge the cargo or freight, in part, or whole. We shall consider the title under the three heads; *first*, Whether a ship can be the subject of a specific lien. *Secondly*, Under what circumstances the master may hypothecate the ship, freight, and cargo; and, *thirdly*, How far he may sell or alienate the ship, freight, and cargo in part, or altogether.

I. And, first, with respect to the point, how far a ship may be the subject of a lien. Of a lien upon a ship.

It has already been said, that ships cannot be the subjects of a specific lien to the creditors who may supply them with necessities. There is a two-fold reason for this; in the first place, because lien always presumes the possession of the article by the creditor; and, therein, his power of holding it till his demands are satisfied;—but in the case of a ship, such possession by those who supply it with necessities cannot occur. For, as regards the master, he is possessed only as the agent and servant of his owners. And as regards those whom he may employ to repair the ship, they have manifestly no other possession, than his workmen; no other possession, for example, than a builder or carpenter employed to build or repair a house. The other reason why ships are not the subjects of such specific liens is, that it would open the door to the manifest mischief of commerce, and would be an impediment to the most valuable article of public and private property, if either the master for any stores supplied by himself, or any of the dealers with the ship, could arrest the departure of the vessel for accounts afterwards litigated, or of small amount. Under these principles, therefore, the law of England rejects almost wholly the doctrine of lien as regards

ships. If a shipwright, indeed, take a vessel within his own docks, or entirely within his own possession, to repair it, he may of course detain such ship till his demand be satisfied, provided he has done nothing inconsistent with the exercise of the right of lien; that is, provided there be no special contract for credit, or custom of trade postponing payment; in the same manner as any other artificer may detain the subject of his own trade under the same circumstance. But if he be not in *actual* possession of the vessel; if it should have quitted his dock, or if he shall have made his repairs without taking the ship into his own mastership and dominion, such shipwright is not preferred by the law of England before other creditors, nor has he any lien upon the vessel merely as its repairer, nor even as its builder.

Rich v. Coe.

Farmer v.
Davis.

Westerdell v.
Dale.

Hoare v.
Clement.

Justin v.
Ballam.

II. Thus, in two early cases *Rich v. Coe*, (a) and *Farmer v. Davis*, (b) Lord Mansfield having expressed himself in the general terms, "that a person, who supplies a ship with necessaries, has not only the personal security of the master and owners, but also the security of the specific ship," Lord Kenyon, in the case of *Westerdell v. Dale*, (c) took occasion to restrict the general application of this opinion. He observed, "In *Rich v. Coe*, it was said, that the person supplying a ship with necessaries has a treble security; the person of the master, the ship, and the personal security of the owners: but I doubt whether that doctrine is not too generally laid down. Sir J. Jekyll held, in a case before him, that the master could not subject the ship if in *England*; and that was afterwards confirmed by Lord Hardwicke." This doctrine, indeed, had been previously affirmed by the courts in the two cases of *Hoare v. Clement*, (d) and *Justin v. Ballam*. (e) In the first of these cases, Clement having supplied the ship with necessaries in an English port, and the ship being afterwards sold to Hoare before his bill was paid, he instituted a suit in the Court of Admiralty against the persons, who were master and owner at the time of the supply, and also against the ship and Hoare himself. Under these circumstances, Hoare applied to the Court of King's Bench for a prohibition against the Court of Admiralty, to stay the proceedings against him and the ship, which was granted. In *Justin v. Ballam*, Ballam had instituted a similar suit in the Admiralty against a Norwegian ship, for payment of the price of a cable and anchor delivered on board the ship to the master, in the River Thames, upon which

(a) Cowp. 636.

(b) 1 T. R. 109.

(c) 7 T. R. 312.

(d) 2 Show. 338

(e) Salk. 34. 2 Lord Raym. 806.

Justin applied to the Court of King's Bench for a prohibition. The court decided, that the ship was not liable to the suit; *first*, Because it did not appear that the ship was in her voyage, when she became in distress for want of a cable and anchor, *and at the time of the contract*; *secondly*, Because there was no actual hypothecation; and they said that although, by the maritime law, every contract with the master of a ship implied an hypothecation, yet it was otherwise by the law of England, unless expressly so agreed. And again, in *Watkinson v. Bernardiston*, (a) where the proceeds of a ship sold had been brought into Chancery, and the plaintiff, who was the master, claimed money paid by him for the accounts of several tradesmen in London, employed upon his order, to make repairs, and find necessities, Sir J. Jekyll, decreed, that this demand was not a lien on the ship. Sir J. Jekyll, indeed, added in the same decree, that if the demand of the master had been for *wages* paid by him to the mariners, and for money disbursed by him on the ship's account in the course of a foreign voyage, it would have been a lien on the ship. But this part of his opinion has been expressly overruled in the case of *Hussey v. Christie and Others*. (b) In this case, Hussey, the master of a ship, had employed several persons to provide her in necessities abroad; and given his own promissory notes for their accounts. Upon returning to England, and finding his owners bankrupts, he endeavoured to retain possession of the ship as his lien and security. Being forcibly deprived of her by the assignees, he instituted this suit in the Court of Chancery to restrain them from selling the ship till his demands should be paid. The Lord Chancellor sent the case to the Court of King's Bench, where the judges all concurred in opinion, that the master had not a lien on the ship. (c) In two other cases before Lord Hardwicke, in *Buxton v. Snee*, (d) and *ex parte Shank and Others*, (e) he made his decrees upon the same principle. In the first case he said, "I know no case where the repairs, &c. whether they were by part-owners, or sole owner, masters or husbands, have been held a charge or lien on the body of the ship." In the latter case, he said, that although the law of Holland gave a person, who repaired a house or ship, a specific lien, there was no such law in England. The last case, indeed, was particularly strong; the person who claimed the specific lien, as having repaired the ship, having obtained possession of the money upon the bankruptcy of the owner.

Of lien on ships.
Justin v. Ballam.

Hussey v. Christie.

Buxton v. Snee, and *ex parte* Shank.

(a) 2 P. Wms. 367. and Abbott, 135.

(c) 9 East. 426.

(b) 13 Vez. Jun. 594.—See likewise *ex parte* Halkett, 3 Vezey and Beames, 135., and Abbott, 141.

(d) 1 Vez. 154.

(e) 1 Atk. 234.

And in the case of *Wilkins v. Carmichael*, (a) where, upon the bankruptcy of the owners, the master claimed to retain the ship as a lien for his wages and repairs, &c. for which he made himself answerable, Lord Mansfield himself said, "As to the stores and repairs, it is a strong answer to the claim, that, when the demand was made by the assignees, the master had not paid. But if there were any lien originally, it was in the carpenter; the master could not, by paying him, be in a better situation than his, and he had parted with the possession, so that he had given up his lien, if he ever had one. The other creditors had none. Work done for a ship in *England* is supposed to be done on the personal credit of the employer. In foreign parts the master may hypothecate the ship." (b)

Of the ship-
wright's lien.

III. Upon all these cases, it may now be considered as an established rule of law, that neither the master, nor any of those dealing with a ship for repairs and necessaries, can have any specific lien on the ship; except in the case of a shipwright or other artificer having actual and entire possession of the vessel, in dock; in performing his work, and retaining possession till payment.

IV. And even in the circumstance of a shipwright having the vessel in his own dock, the existence of a custom in the port or country, that such shipwright shall only look personally to the owners, will take a ship out of the ordinary rule of goods in the actual possession of the workman claiming a lien; and will prevent such shipwright from having, even in this strong case, any lien upon the vessel.

Raitt v.
Mitchell.

This is, indeed, the custom in the river Thames, and of course applies to all ships repaired in the docks in this river. Thus in *Raitt v. Mitchell*. (c) In this case, the defendants were shipwrights, and had a dock in the river Thames. The plaintiff having purchased an *East Indiaman* called the *Ocean*, delivered her to the defendants to be repaired; and she was placed in their dock for that purpose. Nothing whatever passed between the parties with respect to the time or manner in which the repairs were to be paid for, until two months afterwards, when they were completed. The plaintiff having then required that the ship should be delivered back, that she might proceed on her voyage to the *East Indies*, the defendants insisted that she should not leave their dock till security was given for the repairs, which amounted to about

(a) Doug. 101.

(b) See likewise *Wood and Others v. Hamilton*, in Dom. Prac. 1709, reported in substance, Abbott, 140.

(c) 4 Campb. 146. See also the re-

cent decision of *Franklin v. Hosier*, 4 Barn. and Ald. 341. And the opinion of the Lord Chancellor in *ex parte Bland*, 2 Rose, 91.

30007. The plaintiff, protesting against the defendant's right to detain the ship, brought this action which was in case, with a count in trover. On the part of the plaintiff it was proved, that by the usage of trade in the river Thames, where there was no express agreement as to the time of payment, the shipwright invariably gave credit for repairs to the owner of the ship repaired; and that the credit varied in different trades. That it was generally fifteen months; and with respect to East India ships, eighteen months: but that, without a previous stipulation for that purpose, neither ready money payment, nor security, was ever required. On the part of the plaintiff, it was contended, that under no circumstances did there exist a lien for ships, even when there was to be a payment in ready money. The defendants, *contra*, insisted, that it was an established principle, that an artificer had a lien on any chattel upon which he bestowed his labour in the course of his trade; and that there was no reason why this right of lien should not extend to a ship in the dock of a shipwright. That there appeared to be no real difference between a ship in the dock of a ship-carpenter, and a coat in the workshop of a tailor. Lord Ellenborough, "I am of opinion that in this case the defendants had no right to detain the plaintiff's ship. It is distinctly proved that where there is no express stipulation for a ready money payment, credit is invariably given by shipwrights in the river Thames. The period of credit varies in the different trades in which ships are employed: but in each trade it appears to be uniform; and for the repairs of an Indiaman, we are told it is eighteen months; at the expiration of which time it is expected they shall have returned from their voyages, and put funds into the hands of their owners by the freight they have earned. This being the invariable usage, I must consider it as the basis of the contract between these parties; and their respective rights and liabilities are precisely the same as if, without any usage, they had entered into a special agreement to the like effect. A lien is wholly inconsistent with a dealing on credit; and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed. I do not say that a *shipwright has not a lien on a ship in his dock*, where he is to be paid in ready money as soon as the repairs are finished. On the contrary, I am inclined to think that *he has a lien like other artificers*. But there can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired." A verdict was given for the plaintiff.

V. Since the decision of this case, the Lord Chancellor has also determined that a ship, whilst possession is retained, is specifi-

Of liens on ships.

Raitt v. Mitchell.

Custom as to the repairs of ships in the river Thames.

cally chargeable in respect of the expense incurred in repairing it, but that, the possession parted with, the lien is lost. (a) And in another case, sent by his Lordship to the King's Bench, for the opinion of the judges, that court expressly decided, that a shipwright, having a ship in his *actual* possession in his dock, had a lien for repairs. (b)

VI. Upon a review, therefore, of all these cases, the law of lien, as respects ships, may be briefly comprehended in the three points:—

1. That, in no case whatever, has the master of a ship any lien on the vessel for his wages, or for any money paid by him for necessities or repairs.

2. That none of those who deal with the ship, whether at home or abroad, for repairs and necessities, have any lien on the ship, unless a shipwright who shall have the ship in his *actual and entire possession, and shall manually detain it till his debt be paid.*

3. And that even in this latter case, if there be a custom of the port or country that such repairs shall be a personal credit, and not a lien, such custom takes away the right of lien; and the shipwright must deliver up the ship, though actually in his dock. (c)

Power of the master to hypothecate the ship.

Secondly, As to the power of the master to hypothecate the ship, a power which, from the necessity of the case, the master possesses by the maritime code of all commercial countries, and which our own laws have adopted from the earliest period.

VII. As this privilege of the master amounts almost to a power of the absolute disposal of the ship, the custom of all countries, and of our country amongst them, limits this hypothecation by the master to the circumstance of the vessel being in a *foreign country*, or in the course of her voyage, and not in the place of her

(a) *Ex parte Bland*, 2 Rose, 91.

(b) *Franklin v. Hosier*, 4 Barn. and Ald. 341.

(c) In the *John, Jackson*, master, 3 Rob. 288., there was a determination of the Court of Admiralty, which at first view appears to conflict with this doctrine of lien. Some English merchants had supplied an American vessel with stores, &c. for a voyage to the Mediterranean. The ship went and returned to England; and the master being dead, and the owner in America being a bankrupt, was sold in the Admiralty Court in England, under a suit by the seamen for their wages. A surplus remaining after the payment of the wages, the merchants who

had supplied the vessel applied for payment of their demand. The Judge, Lord Stowell, granted it; and added, that upon looking into the cases, he found it had been the practice of the Admiralty Court to allow creditors of this kind to sue against proceeds remaining in the registry, notwithstanding that prohibitions have been obtained on *original suits* instituted by them. That in particular, in the year 1763, he found such a suit was allowed to be prosecuted in the *Adversus, CLAR.* But it is justly observed by a learned writer upon this case, that there was no person to represent the owner, and object to the application.

owner's residence. But this term *place of residence* has received a large interpretation by some of the decisions, both in the courts of law and Admiralty. In *Menetone v. Gibbons*, (a) where the hypothecation was made in Ireland, Ireland was held to be a foreign country so far as to justify the master in hypothecating the ship. And in the *Barbara, Chegwin*, (b) the Admiralty court held, upon the same principles, that Jersey, for the purpose of sustaining hypothecation bonds, might be considered as a foreign possession, to an owner of London. It may be necessary to observe here, that a bond given by the master for money advanced under circumstances of extreme distress, as an hypothecation of the ship and freight, is to be considered in the nature of bottomree. Such bonds have always been held within the jurisdiction of the Admiralty Court, and receive a very favourable consideration. They are, however, considered valid on the ground of necessity only. And, upon the same principle only, a later bond is entitled to a priority of payment over a former. But the same privilege is not to be extended to every species of security which may affect the ship. (c) And with respect to bonds, a priority has been allowed, even when the difference in date was very small, and the bonds were executed at the same place. (d)

Menetone v. Gibbons.

Of hypothecation, and bonds in the nature of bottomree.

VIII. It is usually required as a condition necessary to the validity of an hypothecation bond, that they should be executed in a *foreign port*: but the law does not look to the mere locality of the transaction. The validity or invalidity of the bond does not rest on that circumstance only, but upon the extreme difficulty of communication between the master and his owners; and the master, it is said, will have a right to hypothecate the ship and cargo, though lying in a port of the same country in which the owners reside, provided he has no means of communicating with them. (e) But if the master can correspond with the owners, it is not such a case of extreme necessity as to give him the power of hypothecation. The Courts of Admiralty, looking always to the equity of the circumstances in such a case, have determined, that it is not an obligation of universal necessity that the master should send to the consignee of the cargo, previous to his giving the bond, and take his directions; nor will they decree such bond to be invalid upon the circum-

(a) 3 Term Rep. 267.

(b) 4 Rob. p. 1.

(c) *Rhadamanthe*, Dodson, 204.; and the *Alexander*, 278.

(d) *Betsy*, Dodson, 289.

(e) *The Isabel*, Dodson, 273. The court in this case alluded to the ports of Spain, some of which were, at the time, in the possession of a foreign enemy.

stance of the money having been advanced before the bond be given, if it were the understanding that the money was to be secured by means of bottomree; nor will the high rate of interest affect these bonds, when the casualties and risks to be provided against are very great. (a) Such a bond, moreover, is not invalid for want of a particular description of the voyage: but the master may describe the voyage, *cypres*, as near as he can. (b)

IX. We have already said that the master ought not to hypothecate the ship, or to give a bottomree bond, unless in case of necessity. Therefore, when another species of security, entirely personal, as a bill of exchange, was resorted to, at the time, it cannot be said that the master had no personal credit, or other resource for procuring supplies, except on bottomree; and under these circumstances Lord Stowell decreed a bottomree bond to be invalid. But it appearing that some part of the money borrowed had reference to a security by bottomree, he permitted the bond to stand for that part; for in the Court of Admiralty it is not necessary that a bond should be either good or bad *in toto*. (c) But when money has been well advanced upon such bottomree security, there is nothing inconsistent in taking a collateral security as bills of exchange; nor does such transaction exclude the bond, or diminish its solidity. (d) And where the master is well authorized to raise money on such bonds, the party lending is not obliged to look to the application of the money; and though there may be some dishonesty in the master, the merchant, if he does not participate, cannot be affected by it. (e) A hired transport in the government service is not incapacitated from being the subject of hypothecation by a bottomree bond; (f) and the Court of Admiralty will not reject a claim justly founded, by a minute criticism of the language of the bond, but will look to the substantial justice of the case. Where, therefore, the consignee, upon the direction of the master, appointed another, who was in some degree recognized by the owner, describing him as master, Lord Stowell decided that he was competent to hypothecate the ship, and a bottomree bond made to secure advances by such consignees was held to be valid. And the warrant of the court will extend to the sails and rigging, though detached and on shore, if so detached only for the purpose of safe custody. (g)

(a) See the preceding Note.

(b) Dodson, 463.

(c) *Augusta*, Dod. 283.

(d) *Jane*, Dod. 466.

(e) *Jane*, Dod. 465.

(f) *Ibid.* 463.

(g) *Alexander*, Dod. 278.

X. A bottomry bond is a negotiable instrument which may be put in suit by the person to whom it is transferred; and it is almost unnecessary to add, that if the money be not paid within the time conditioned in the hypothecation bond, the ordinary course of practice is, for the agent of the lender to apply to the Court of Admiralty to issue its warrant for the arrest of the ship, and for trial of the demand claimed upon the contract; under which circumstances, if the bond be not satisfied by the parties, the court will decree a sale, and distribute the proceeds according to the justice of the case. (a)

A bottomry bond is a negotiable instrument.

XI. According to the nature of hypothecation, the owners are never personally responsible: but the remedy of the lender is against the master and the ship only. But though it be not the ordinary practice for the master to give a supplementary security upon his owners beyond the hypothecation bond, there appears no good objection against it, so long as the lender does not confound two distinct obligations, by claiming maritime interest upon a security without risk. Therefore in *Samson v. Bragington*, (b) where a Jamaica merchant had taken both an hypothecation bond and bills upon the owner for money advanced to refit the ship, and the ship being lost, sued upon his bills of exchange, the Court of Chancery decreed that he should recover the money, but without the maritime interest.

XII. Nor has the master the power to hypothecate the ship and freight only; but in case of necessity, as for example, when the value of the ship is an insufficient security for the amount of the repairs, he may hypothecate ship, freight, and cargo. Thus, in *Parmenter v. Todhunter*, (c) a case of capture and recapture, when money was wanted in the instant to pay the salvage to the re-captors, and the mate procured it by hypothecating the ship and selling a part of the cargo, Lord Ellenborough held, that in the absence of the master he was justified in so doing. But the whole question came before the Court of Admiralty in the case of the *Gratitude*, (d) upon which occasion it was deliberately decided that the master might hypothecate the cargo as well as the ship. As this is one of the most important cases of late years, and contains a more ample illustration of the law of hypothecation, it deserves the peculiar attention of the reader.

Of the hypothecation of the ship, freight, and cargo by the master.

XIII. The circumstances of the *Gratitude* were as follows:—The imperial ship the *Gratitude*, bound from Trieste to London

(a) 1 Vesey, 443.; and see *post*.

(b) 1 Vesey, 443.

(c) 1 Campb. 541.

(d) 3 Rob. 246.

The master
may hypothecate the cargo,
and sell a part:
but he has no
authority to
sell the whole.

with a cargo of fruit, suffered so much from tempestuous weather as to be compelled to go into Lisbon to refit. The master, seeing that the vessel itself was not of value sufficient to pay for the repairs, applied for advice and assistance to one of the Portuguese correspondents of the consignees in England; this Portuguese wrote to the consignee, and received an answer from them, that it belonged to the master exclusively to adopt every necessary measure for the preservation of the cargo; and if it was necessary to unlade, the master alone was to judge of the propriety of such a measure. Accordingly, the master, being in want of money to defray the charges of repairing the vessel and of unloading the cargo, he borrowed the necessary sum on a bottomry bond, binding the ship, cargo, and freight, to pay the said sum within twenty-four hours after her arrival in the port of London. The master, however, refusing to discharge the bond, the holder instituted this suit in the Admiralty against the ship, freight, and cargo, and prayed the court to decree accordingly. The court ordered the bond to be enforced against the cargo as well as the ship. Lord Stowell said, in substance, that the security of the ship not being sufficient, and the master not being able to raise money on that alone, he was necessarily obliged to resort to the cargo; that it could not be said that the master is in all cases to wait till he hears from a distant country. That the necessity of such a case therefore compelled a choice of one of two things, *to sell a part of the cargo* for the purpose of applying the proceeds to the prosecution of the voyage by the repair of the ship; *or to hypothecate the whole* for the same purpose. With respect to the former, (the sale of a part of the cargo,) the books overflowed with authorities. With respect to the cargo, indeed, the power of selling could not extend to the whole, because it never can be for the benefit of the cargo, that the whole should be sold to repair a ship which is to proceed empty to her destination. But that hypothecation might be of the *whole*, because it may be for the benefit of the whole that the whole should be conveyed to its proper market; the presumption being that this *hypothecation of the whole*, if it affects the cargo at all, will finally operate *to the sale of a part*, and this in the best market, at the place of its destination, and in the hands of its proper consignees. The advocates on the opposite side having suggested that the master might have sent the cargo by another ship, the same learned judge added, that there were no authorities to bind the master to such transshipment; and that upon all these principles he should decree the hypothecation to be valid.

XIV. The Court of Admiralty, regarding these hypothecation bonds with a peculiar favour, has, upon some occasions, administered justice to them with a very large equity; and in the case of the *Jacob, Baer*, (a) extended the pledge of the freight of a vessel from a particular voyage to a subsequent one. The master had pledged the vessel and freight to a merchant at Baltimore, to be discharged upon the vessel's arrival at Cork. Instead of going to Cork the ship went to Dublin, and the Baltimore merchant did not receive the freight. The ship afterwards sailed to America, and thence to London, where she was arrested and sold, at the suit of the lender. The proceeds not being sufficient to pay the amount lent, and the freight of the last voyage being in the hands of the agent of the owner, the lender applied to the court to have this freight paid over to him. The court, under the peculiar circumstances of the case, granted the prayer of the petition, the judge observing, that as there were no third persons concerned, but the freight was in the hands of the agents of the owner, he should decide according to the equity of the case. Accordingly, the lender in this case having an hypothecation on the freight to Cork, was paid by the freight from America, no third party, as the judge observed, being interested, and there being the most manifest justice that the owners should pay what they did not deny that they owed.

The Gratitude.

Jacob, Baer.

XV. As an hypothecation, by the very nature of the contract, is an obligation upon the ship executory only in the case of default of payment, it is manifest that such an hypothecation does not alter the property of the ship, nor transfer it to the lender. The master, therefore, exceeds his authority, if he not only pledge the ship and cargo, but engage to deliver it to any agent of the lender in the first instance. In *Johnson v. Greaves*, (b) where the ship was arrested by the Prize Court in Jamaica, and the master, in order to procure her liberty, gave bills of lading of the cargo to one who became bail for the ship and cargo there; it was held by the Court of Common Pleas, that the master had no authority to contract that the cargo should be sold in London and the proceeds remitted back to Jamaica, the owners being ready to give a sufficient security to indemnify the bail in London.

Hypothecation does not alter the property of the ship.

XVI. It is totally unnecessary to add, that the master cannot take up money by hypothecation, except for the necessary repairs or victualling of the ship, or for forwarding the adventure; and that, in order to prevent any fraud, the law always presumes that the lender advanced the money upon seeing and knowing the

(a) 4 Rob. 245.

(b) 2 Taunt. 344.

Limits to the
the master's
power to hypo-
thecate.

necessity of the ship; and under this principle admits the owners to prove, if they can, that there was no such necessity. Upon this evidence, the court will exercise its discretion, whether the money has been fairly advanced for the purposes of the ship, and for the benefits of the owner; or whether there have been a collusive fraud between the master and the lender. But if the necessity, or great and manifest utility to the ship and adventure, be made to appear, or rather if the owners cannot shew the contrary, the owners are bound by the hypothecation, however the master may have misapplied the money. But as the law will not presume fraud, the lender, upon demanding the satisfaction of the bond of hypothecation, is not bound himself to prove this state of the ship's necessity, but the owner must shew the contrary.

XVII. We have before observed, that if the master shall have given more than one of these hypothecation bonds at different periods of the voyage, the last is entitled to priority of payment; the principle of which rule is, that the vessel was saved by means of the last. (a)

An agent
abroad, whose
duty it is to
advance money,
is not allowed
to take a bot-
tomry bond in
ordinary cases.

XVIII. Before we conclude this subject it will be necessary to observe, that the Courts of Admiralty look narrowly into transactions of this kind; and will not, in ordinary circumstances, allow an agent abroad, or any person whose *duty* it is to advance money, and to forward the adventure, to cover himself by a bottomry bond, and to take maritime interest. There are cases, however, in which this rule has been relaxed. The case of the ship *Hero*(b) was a cause of bottomry brought by the holder of an instrument purporting to be an hypothecation-bond for 900*l.*, with maritime interest after the rate of 10*l. per cent.* against the ship, cargo, and freight, and also against Messrs. Donald and Son, the owners. Lord Stowell, in giving judgment in this case, observes, that it was unnecessary to say that bonds of this description, when entered into fairly and *bona fide*, are very favourably regarded in this court. They are given as security for money advanced for the necessary use of a ship in a foreign port, where the owners and the master have no personal credit, and where, without such assistance, the ship must continue to lie until it becomes rotten and useless. It is highly expedient, therefore, that they should

(a) Dodson 204, & 278. And see the case of the *Sidney Cove*, 2 Dodson, 2. The *last* hypothecation bond executed must be the *first* paid. And *semble*, that in a foreign port, a mere agreement to give an hypothecation

bond for necessary repairs will bind the vessel as much as if the instrument were actually executed. *Ex parte Halkett*, 2 Rose, 194. *per Lord Eldon*.

(b) Dodson's Adm. Rep. Vol. II. p. 139.

be upheld with a vigorous hand. The principle on which they are founded and supported is of great antiquity, and deeply radi- cated in the general maritime law from which it has been trans- planted into the law of this country. Where the master can- not procure the necessary supplies on the personal credit of himself or his employers, there can be no doubt that he is at liberty to pledge the ship itself, by way of security to the lender, and to stipulate for the payment of interest after a rate which, in cases of bonds granted under other circumstances, would be deemed usurious. It is said that this bond is objectionable on the face of it; that Mr. Coates, the holder of the instrument, although he is to receive an extraordinary and maritime interest, is not to take upon himself the risk of the whole voyage. The vessel, it appears, was to commence her voyage at Liverpool, to go to St. John's, in the island of Newfoundland, and to return to Liver- pool: but the outward voyage only was to be at the risk of the lender. But the objection is hardly to be deemed a fatal one. The lender was to be entitled to an interest of 10l. *per cent.* (cer- tainly not an extravagant rate of interest on a maritime bond) until the arrival of the ship, or for a certain specified time; and after that he was to receive common interest only. It appears, therefore, when duly considered, to be little more than a bond for maritime interest on the voyage to St. John's, and a postponement of the payment of the money until the arrival of the ship at Liver- pool. The bond, then, would have been more properly expressed if it had stated that the money was lent on a voyage from Liver- pool to St. John's only,—and not back again to Liverpool. This would certainly have been more regular: but it appears that the ship was expected to come back, and that the party was willing that the payment should be postponed until the time of her return. Under these circumstances, the objection to the bond cannot be regarded as fatal. Another objection has been raised, of a different kind. It is said that the bond is not good because it is granted *to the agent of the owner*, who is bound to supply the necessary funds for the disbursements of the ship, without looking to a bot- tomry bond to secure the repayment of the money. It has been argued, and with apparent propriety, that a person to whom the ship is consigned by the owner, and who must be in constant cor- respondence with him, ought to make the necessary advances without demanding maritime interest; and it has been truly said, that a party is not at liberty to act as the agent of the owner, and at the same time to take upon himself the character and privileges of a stranger; to act as if there were a necessity, when no neces-

Of the general principles of hypothecation.

The Hero.

Necessity is the foundation of a bottomry bond.

Summary of the master's power to hypothecate the ship.

sity exists. The case of necessity, which is the foundation of a bottomry bond, does not arise where there is credit existing on which money can be obtained without resorting to the real security of the ship. At the same time I will not take upon myself to lay it down as a universal proposition that an agent may not, under any circumstances, take the security of a bottomry bond. Cases may possibly arise in which an agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed ; and if he finds it unsafe to extend credit to his employers beyond certain reasonable limits, he may then surely be at liberty to hold hand, and to say, I give up the character of agent ; and, as any other merchant might, to lend his money upon bond, to secure its payment with maritime interest. If, in such a case, he gives fair notice that he will not make further advances as agent, and affords the master an opportunity of trying to get money elsewhere, and the master is unable to do so, but is obliged to come back to him for a supply, then he is fairly at liberty, like any other merchant, to advance the money on a security that is more satisfactory to himself. I will not say that the case might not go further.—If the agent had given credit for all the disbursements of the ship, and found, contrary to his expectations, that they amounted to more than he calculated, and went beyond any advances which he might reasonably be called upon to make on the mere personal credit of his employers, and if there was no time to look to other quarters for assistance, he might possibly be justified in resorting to this species of security, giving the earliest notice of the necessity under which he acted. Under such circumstances he might not, perhaps, be out of the reach of the protection which a bottomry bond would afford him.

XIX. Such, therefore, are the powers of the master to hypothecate the ship, and to give bonds in the nature of bottomry in a foreign port ; and such are the limits within which he may exercise this privilege. Upon a review of all the above cases, and others of a similar nature, which we have not deemed it necessary to state, the law and rule of such hypothecation may be summarily comprehended in the three following points :—

First, If a ship be in a state of necessity, and in the course of her voyage, whether she be in a foreign port, or in a port of one British island, (the owners living in another,) or even in a remote port of the same kingdom, the master may hypothecate ship, freight, and cargo, for her repairs and necessities.

Secondly, But two circumstances must always exist in the condition of the ship at the time of hypothecation. 1. The state of necessity of the ship for repairs or victualling. Such a remoteness

from the owners as not to admit of awaiting their advice and directions. 2. The impossibility or difficulty of obtaining money and supplies on the personal credit of the master or owners. (a)

Thirdly, The law will presume such a remoteness, if the ship be in a foreign port, or in one British island or colony, whilst the owners are in another. But in the latter case there must be strong evidence of the extreme necessity of the ship.

Next, As to the power of the master to sell the ship and cargo, or alienate it in part or whole.

XX. It has been before observed that from a just jealousy of the relation of the master to the vessel, and the facility it would afford him to commit frauds whilst in remote countries, the law will not allow him, except in an extreme necessity, to sell the ship; and we shall here add that the necessity must be so extreme, that in *very few* cases, indeed, can the ship be safely purchased of the master. Thus in *Tremenhere v. Tresilian*, (b) and in *Johnson v. Shippin*, (c) Sir Matthew Hale and Lord Holt both decided that the master had no authority to sell the ship or any part of it, and that his sale would transfer no property. The case before Sir Matthew Hale was, indeed, particularly strong; the sale having been made in a foreign country, in a case of inevitable danger, the ship and tackle being beaten and broken, and no hope of saving any part of them. But all this Sir Matthew Hale, at that time Chief Baron of the Exchequer, thought, could not warrant the sale of the ship by the master; nor could such a sale convey the property to the buyer. It is stated, indeed, by an English reporter of very early date, that the master may in some cases sell the ship, as in the case of famine. (d) It is said, however, by an author of the first authority, that the exception of extreme necessity rather fortifies than weakens the general rule, and that no person can safely purchase a ship of the master in any case which does not clearly fall within the principle upon which the exception is founded; and such a case will rarely happen. And although the master be himself a part-owner of the ship, yet will not his sale of the ship be good for more than his own part; for the interest of part-owners is so far distinct, that one of them cannot dispose of the share of another; whereas, in articles of ordinary sale, one partner may in general transfer the whole property, if the transaction be without fraud. (e)

The authority of the master to sell the ship or cargo.

(a) Where money is advanced on personal security, it is not in the nature of a bottomry transaction.

(b) 1 Sid. 452.

(c) 2 Lord Raym. 984.

(d) Jenk. Cent. 165.

(e) Abbott, 3.

Of the sale of
the ship by the
master.

But this principle, its limits, and the reason upon which it rests, have been so strongly illustrated by some recent cases, and particularly by *Reid v. Darby*, *Hunter v. Prinsep and Others*, (a) and the *Fanny and Elmira* (b) in the Admiralty Court, that a compressed view of these cases will be the best exposition of the law upon the subject.

The case of the
Glamorgan.

XXI. In *Reid v. Darby*, the *Glamorgan*, a British ship, having sprung a leak at Tortola, the master applied to the Admiralty Court to order a survey. The court accordingly ordered such survey to be made; and the surveyors gave in their report that the vessel was not seaworthy, nor repairable so as to carry the cargo to its place of destination, but at an expense exceeding the value of the ship when repaired. Upon this report the Vice-Admiralty Court decreed that the said ship being totally unfit to proceed with her cargo to London, and the repairs being estimated to amount to more than her value when such repairs should be completed, the ship should be sold, and the proceeds paid to the master. The vessel was accordingly sold; and, after a further intermediate voyage from Tortola to Nevis, was sent to London. When this suit was instituted by the owners to recover the ship from the purchasers, two questions were before the Court of King's Bench; the *first*, whether the sale could be sustained under the authority of the Vice-Admiralty Court; and, *secondly*, whether it could stand on the authority of the master. The first question was at once determined in the negative; and with respect to the second, Lord Ellenborough expressed his inclination to abide by the rule laid down by Lord Holt in *Johnson v. Shippen*, (c) that the master has no authority to sell any part of the ship, and that his sale could transfer no property. The sale, however, was determined to be invalid upon another ground, namely, that the forms of the registry acts had not been complied with.

Hunter v. Prinsep.

XXII. In *Hunter v. Prinsep and Others*, (d) though the substance of the case went upon other circumstances, the same question incidentally arose before the court; and the principle of *Reid v. Darby* was re-affirmed by Lord Ellenborough, that the master, except in a case of paramount necessity, had no authority to sell the ship.

The *Fanny and Elmira*.

XXIII. In the *Fanny and Elmira*, a former owner of an American

(a) 13 East. 143, & 378.

(b) Edw. 117. But see some more recent cases, *post*. *Idle v. Royal Exchange Company*, 3 Bay. Moore, p. 115. *Borham v. Read*, 3 Brod. and

Bingh. 147, and *Freeman v. East India Company*, 5 Barn. & Ald. 617.

(c) 2 Lord Raym. 984.

(d) 10 East. 143.

vessel applied to the Court of Admiralty for the restoration of the ship under the following circumstances. The master stated in an affidavit, that in consequence of damage which the vessel had sustained by getting upon the rocks in Sligo Bay, he deemed it right to cause a survey, which was accordingly made by competent persons, who reported that it would require 1,500*l.* to repair the vessel, a sum far exceeding her value; and that it would be for the interest of the parties concerned to have her sold. That, in consequence of this advice, the ship was advertised for sale, and was accordingly sold, upon which he (the master) executed the bill of sale, and delivered it into the hands of the agent of the purchaser. The purchaser soon afterwards made him an offer of a fourth of the vessel at the price which he had given, provided he would consent to navigate her again as master; to which he acceded. After the vessel was repaired, she proceeded on a voyage to Riga, from whence she was returning to the port of London, when she was captured by the Danes, and recaptured by the Hound sloop of war. Lord Stowell, in his judgment on this case, which has been justly celebrated, delivered his decree in the following terms:—

“This is the sale of a vessel made in Ireland by the master without the authority of his owners; and it is contended that such a sale, being made under the pressure of necessity, will convey a valid title to the purchaser. But, in the first place, *it must be shewn that there was a necessity*; and then it remains to be considered whether it was such as by law would give the master a right to sell. That such a case may arise, I am not prepared to deny: suppose, for instance, a ship in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her into repair. Under these circumstances, what is to be done? The ship may rot before the master can hear from his owners; and, therefore, if the necessity were clearly shewn, with full proof that every thing was done *optima fide*, and for the real benefit of the owners, the court might be disposed to sustain a purchase so made. There is a very convenient practice which obtains in the Courts of Vice-Admiralty in the West Indies, where the fact of distress being proved, the transaction is not left to the master, but a sale is ordered under the superintendence of the court itself. The legal validity of such transfers has, however, been contested in the courts of this country; and they were not held to be good; though the learned Lord, who presided in the court where that decision took place, might perhaps incline to consider it as a defect in the law of this country, that a practice so conducive to the public utility could not legally

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be maintained. In a case of that description, I say, strongly put, where there was no ground for suspicion, *although I do not know that such a power is given to the master by the general maritime law*; yet, feeling its expediency, this court would strain hard to support the title of the purchaser. But then there must be the clearest proof of the necessity; it must be shewn not only that the vessel was in want of repair, but likewise that it was *impossible to procure the money for that purpose.*"

Condemnation by a Vice-Admiralty Court not conclusive against the former owner of a ship, sold by the master.

Case of the ship Grace.

Of the authority of the master to sell ship or cargo.

XXIV. A false opinion seems to prevail amongst masters, and those who claim under sales of ships made by them in cases of necessity, that this extreme necessity is sufficiently established, if they procure the order of some Vice-Admiralty Court abroad to have their vessel surveyed, a report of the surveyors that she is not seaworthy, and a consequent sentence of condemnation by the Vice-Admiralty Court. But we have already shewn in *Reid v. Darby*, that the courts of this country will not recognize in the Vice-Admiralty Courts abroad such a power to order the sale of the ship. And in *Hayman and Others v. Moulton and Others*, (a) a condemnation of this kind was rejected as of insufficient authority. The circumstances of this case were peculiar. The plaintiff Hayman, the owner of the ship *Grace*, brought his action to recover the value of the ship. The ship had been built in 1799; and two years afterwards had been sent on a voyage to Jamaica, where she discharged her cargo, but immediately afterwards encountered a hurricane, and was driven on the shore of that island. The master, under these circumstances, applied to one Cunningham, the consignee of the vessel at Jamaica, for advice how to act; and under his advice made the usual protest of the state of his vessel, and applied for a survey. The deputy naval officer of the island accordingly issued his warrant to four masters of ships, desiring them to examine the *Grace*, and make a return upon oath of her state and condition. They reported that they had been on board, and found the ship settled in a sand-bank four feet, with a bank of sand between her and the sea of twice her length, and not more than two feet water on the sand-bank; and that they were, therefore, unanimously of opinion, from the great expense that would be incurred in attempting to get her afloat, and the little chance of succeeding therein, that it would be most for the advantage of the underwriters, and all others concerned, to sell the ship as she then lay, with all her materials, to the best bidder. Cunningham advertised the ship for sale by auction *as a wreck*;

(a) 5 Esp. N. P. C. 65, and likewise reported in Abbott, p. 7.

he acted as auctioneer, and charged his commission, and she was sold to one Dunn, who sold her to R. Molton, by whom she was sold to the other defendants. The plaintiff contended that no fair transfer of the property had taken place, the transaction being fraudulent; that Kirby, one of the defendants, had been one of the persons employed in the survey; that the ship had not bilged then, though it was so stated in the survey; but was readily got off, and sailed soon after to England; and performed that voyage in safety; that Cunningham acted as auctioneer; and, without any authority, had undertaken to conduct the sale for the plaintiff; and which sale, with a view to effect a fraudulent transfer, had taken place before the time advertised. This was insisted upon as a strong mark of fraud. Lord Ellenborough, in delivering his opinion to the jury, said, that a captain of a ship had by law a right to hypothecate her in a foreign country for the purpose of raising money for her necessary repairs: but he had no such general authority by law as to sell. The case of *Tremenhere v. Tresilian* (a) had been cited to that effect; and no doubt the law was so: but there were circumstances arising in consequence of the increase in our commercial transactions, which *might admit some extension of that rule of law*. Where a case of *urgent necessity and extraordinary difficulty occurred, where a ship had received irremediable injury, his Lordship said, that the disposition of his mind would be, to support the principle that the captain might sell the ship for the benefit of his owner*. But such sale could only be justified by extreme necessity, and the most pure good faith; that is, if the vessel were in such a state as to render it probable that the owners themselves would have sold the ship, if upon the spot. His Lordship concluded by saying, that he should leave it to the jury "whether, in this case, there existed *such a necessity as called upon the captain, acting for the benefit of his owners, to sell the ship; and if there did, whether this was a fair sale, or conducted with any fraud?*" It appears that a survey has been made: but there is no evidence that the captain ever made any attempt to raise the vessel. He should have applied to the agent for the ship, and have endeavoured to procure money for the purpose. If all means of this sort failed, the necessity of selling would have been more pressing; and I think the captain should have done so. With respect to fraud in the sale, I observe in this case much that calls for reprehension: a survey has been made; and some of those who made the survey have become the

Of the sale of the ship by the master.

Hayman v. Moulton.

In cases of extreme difficulty and urgent necessity, *semble*, that the master may sell the ship for the benefit of the owners.

(a) 1 Sid. 452.

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purchasers. I think such conduct highly improper. A court of equity will not allow a trustee to become a purchaser of property of which he is trustee; such jealousy does a court of equity entertain of a man's availing himself of information obtained by means of his situation. It would be a useful lesson to persons circumstanced as they are here; they should make their election either to be surveyors or purchasers: but they should not be both, by which they are placed in a situation unfairly to avail themselves of information they have obtained as surveyors." The jury accordingly found a verdict for the plaintiff. (a)

Andrews v.
Glover.

XXV. In the case of *Andrews v. Glover*, (b) which was an action brought to recover the value of a ship in like manner condemned, and sold at Tobago, as incapable of repair, and in which also the plaintiff succeeded, his Lordship said, that he considered a proceeding of this sort, not as a sentence of a court pronounced for the captors of a captured vessel, but rather as the inquisition of a sheriff, for the purpose of information to those who, under certain circumstances, have the power of selling the ship. Such an inquisition is not conclusive upon the party whose property is in question.

Underwood v.
Robertson.

XXVI. In *Underwood v. Robertson*, (c) the same question came again before the court, upon an action on a policy of insurance. A ship going from London to Demarara, and insured for that voyage, had been captured by an American privateer near to that island, upon which occasion she was plundered of her stores, and all her crew, except the captain and one boy, taken from her. Being immediately afterwards re-captured, and carried into St. Thomas's, the captain made an instant application to the Vice-Admiralty Court of Tortola, (which is the court of all these islands,) for an order and authority to sell the ship and cargo. The order was accordingly given upon his petition; and the ship and cargo were immediately afterwards sold, and at a loss of 60 *per cent.* on the cargo. The question before the court was, whether the captain under these circumstances had a right to sell the ship and cargo, and to break up the adventure, so as to entitle the plaintiffs to recover against the underwriters as for a total loss. Lord Ellenborough was of opinion, that the captain *under the circumstances of the case* had no right to sell the ship and cargo. If the captain could not at first have procured a competent crew to navigate the

(a) In the progress of the trial no regard was paid to the authority of the deputy naval officer, who, of course, had no jurisdiction on the subject.
(b) Abbott, 9.
(c) 4 Campb. 138.

vessel, he should have waited a reasonable time for the purpose. To have enabled him to pay the captor's *eight*h, he was bound to have tried, and to have tried seriously and deliberately, every other expedient to raise money before disposing of any part of the goods intrusted to his care. It did not satisfactorily appear that he might not have raised the money by drawing on his owners, or by hypothecating the ship. He had come to the conclusion of selling the vessel and cargo in three days. The cargo was only to be resorted to in the last extremity, when every other expedient had failed, and every other resource was hopeless.

Of the sale of the ship by the master.

XXVII. In the late case of *Idle v. The Royal Exchange Assurance*, the power of the master to sell ship and cargo came before the Court of Common Pleas. (a) It must be confessed that this case, upon a first view, seems to extend the authority of the master over the ship and cargo, further than any preceding case. It must, however, be considered as determined strictly upon the *special facts and circumstances*, and not as establishing any new principle of law. The case was this:—Freight was insured on a ship and cargo of timber, from Quebec to London. The ship sailed from Quebec, and on her voyage down the river St. Lawrence sprung a leak; and it became necessary, for the preservation of the lives of the master and crew, to run her on shore. She took ground on the outside of a reef of rocks; and was there fixed and exposed to the full force of the stream, and in the way of the drift ice, then forming and floating down the river. One of the part-owners, and agent for the others, resided at Quebec; and after two surveys, in which the surveyors stated as their opinion, that it would be prudent to *sell the ship and cargo*, the master, under the direction of such part-owner, sold the same. The ship, however, survived, and was repaired by the purchasers; and afterwards brought a full cargo to London. In an action on the policy against the underwriters on freight for a total loss, the Court of Common Pleas decided, *first*, that under the circumstances, the master was warranted in selling the ship and cargo; and, *secondly*, that an abandonment of the freight was unnecessary. It is to be observed in this case, *first*, that the plaintiffs, who were the persons interested in the cargo, recognise and adopt the act of the master as done for the best under the circumstances. The jury found, specially, that the master had acted fairly throughout the whole transaction, and *bona fide* for the benefit of all concerned; and that the sale was

Idle v. The Royal Exchange Assurance Company.

Of the authority of the master to sell ship and cargo.

honestly and properly conducted. It was not a question, therefore, between the owners of the cargo and the master, whether the latter, under *any* emergency, could sell the ship and the *whole* cargo : but it was a question between the owners of the cargo and the underwriters on freight, in which case the authority of the master, acting for the interest of the whole adventure, may, possibly, be deemed to have a more liberal extent. If the owners on the spot might have sold ship and cargo under the circumstances of this case, and have claimed compensation from the underwriters, it should seem that they might expressly, or by implication, have deputed as large an authority to the master. The owners, by adopting the master's act, confirm and ratify it *ab initio*. This, therefore, is to be considered as a case where the master, under such incidents of the adventure as made the sale honest and discreet, acted as the authorised agent of the owners. In point of law the sale became *their* act through the master. *Secondly*, it is further to be observed in this case, that the sale was made by the authority of one of the part-owners who acted as *agent* for the others ; and, although part-ownership in a ship is not like the case of a joint concern or partnership, as one part-owner of a ship cannot bind the rest, it is still to be considered as an important circumstance in this case, that one of the part-owners *actually directed the sale*.

Upon the judgment in this case, which produced some apprehension in the mercantile world *as to the alleged authority* of the master to sell the ship and cargo, a writ of error was brought in the King's Bench. When the case came on for argument in K. B., that court called on the counsel, who was for the defendants in error, to point out how it appeared by the special verdict that the sale was necessary ; and after hearing some observations from him to shew that the necessity was to be inferred from the finding of the jury, expressed a clear opinion that the necessity did not appear, and awarded a *venire de novo* for the purpose of trying whether it existed or not. Bayley, J. said that the question, whether the circumstances amounted to an abandonment, might also be left open. The case having been settled, never came to trial on the *venire de novo*.

Of circumstances which may justify the sale of the ship by the master.

XXVIII. Some cases, however, have latterly occurred, in which the courts have expressed a strong opinion, that where the master makes a sale of a ship in a foreign port, *bona fide*, and under urgent necessity ; there being no means to repair her, and every circumstance of the case justifying his conduct, that under such a condition of things, the sale will be legal as respect the under-

writers; but the case has not yet been decided between the master and owners. But in these cases the fact of the necessity of a sale should always be found by the jury. Thus in the case of *Bonham v. Read*, (a) which was an action on a policy of insurance. The ship sailed seaworthy from Calcutta on her voyage home, when, in addition to some damage which she sustained in the River Hooghly, she encountered two storms at sea, by which she was so shattered as to render it necessary for the captain to put back; and he returned to Calcutta on the 30th of August, 1820. On his arrival at Calcutta, he gave notice of abandonment to the agents for Lloyd's, resident there; and requested that their surveyor might be present at the surveys of the ship. The agents said they had no authority to accept the abandonment: but their surveyor attended the surveys, when it was found that the ship was so seriously damaged that the expense of repairing her would be nearly 5000*l*. The agents refused to undertake the repairs; and the captain, *having in vain attempted to borrow money for that purpose, by the hypothecation of the ship, sold the ship for 1200*l*.*, conceiving that to be the best course for all parties. On the 25th of April, 1821, the captain arrived in London, where the owner resided, who expressed no disapprobation of his conduct; and on the 3rd of May the ship's papers were delivered. On the 5th of May, the ship's broker abandoned to the underwriters. In an action on the policy on the ship, the jury having found a verdict for the plaintiff as for a total loss, and that the captain had sold the ship for a justifiable cause, the court (b) refused to grant a new trial, which was moved for, on the ground that the ship *ought not to have been sold*, and that notice of abandonment had not been given in due time. It was contended that a captain can only be permitted to sell in cases of extreme necessity, such as a moral or physical impossibility of repairing; and no such necessity existed here; the ship was staunch when she sailed, and money might have been raised by hypothecation of the cargo. (c) It was long doubted whether a captain could lawfully sell under any circumstances. *Reid v. Darby*. In *Idle v. Royal Exchange*, this court held there was such an extreme necessity: but the Court of King's Bench, doubting whether that had been made out, ordered a *venire de novo*. (d) At all events,

*Read v.
Bonham.*

Of circumstances which may justify the sale of the ship by the master.

(a) 3 Brod. & Bing. p. 147.

(c) Case of the *Gratitudine*, 3 Rob.

(b) Richardson, Justice, dissented from this judgment.

241. and see *Park's Insurance*, 618.

(d) 8 Taunt. 72.

Of circum-
stances which
justify the sale
of the ship by
the master.

a captain cannot be justified in selling the ship, except in a case in which he would have sold her if she had been uninsured. *Green v. Royal Exchange Assurance*. Dallas, C. J. "The jury have found, in this case, that the captain had a justifiable cause for selling the ship; and they found this on all the facts in evidence in the cause. To those it becomes, therefore, necessary in the outset to refer; and the more so, because an endeavour has been made, though I do not say improperly, to impeach the conduct of the master, as if he had acted for his own benefit, or for the benefit of his owners, instead of acting for the benefit of all concerned. The ship having been seriously damaged in a storm,—what was the conduct of the captain on his return to Calcutta? It is admitted that the underwriters have agents at Calcutta; not indeed for the purpose of accepting abandonments, but for the purpose of transmitting information. However, they have agents there,—and what could the captain do more, as a man of justice, honour, and integrity, than give notice of abandonment to those agents? He could not abandon to the underwriters, for they were not on the spot. If their agents were not authorised to accept abandonments, they might at least have transmitted intelligence of them; and there was no other person to whom abandonment could be made. What is the next step? The captain submits the ship to a regular survey by competent persons; and, not content with his former notice to the agents, gives notice also of the survey, and invites the agents to send some one to attend. They return for answer that they will, if required, send their surveyor to attend to his official capacity. Accordingly; one of the surveyors who signed the report, which was in evidence in the cause, and proved the shattered state of the ship, was the surveyor appointed by Lloyd's agents. At one time the captain was inclined to repair the ship, if it had been possible; and that is clear from the attempt which he made to borrow money for the purpose. The captain then says, that he had not money to go on with the repairs; and that, in the state in which the ship was, it would have been madness to attempt to repair her. Under these circumstances, the captain sells the ship, after a public advertisement; the agents of Lloyd's being on the spot, no protest being made against the validity of the sale, nor any thing communicated by them, to impeach its validity; and the jury came to the conclusion that the captain was perfectly warranted in all he did. The direction of Lord Mansfield to the jury, at the trial of the cause of *Miller v.*

Fletcher, (a) was, "that if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss." Afterwards, upon the motion for a new trial, Lord Mansfield said, "The captain had no express order: but he had an implied authority, from both sides, to do what was fit and right to be done; and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within his contract of indemnity." Finally, he says, "I left it to the jury to determine, whether what the captain had done was for the benefit of the concerned. If they had found that it was,—where would have been the question of law?" So was it left to the jury in this case; and they have found that what was done, was done in the exercise of an honest discretion, and for the benefit of all concerned; and I see no reason, (the jury having been special, and peculiarly competent to judge of such subjects,) to overturn the conclusion to which they have come."

Reed v.
Bonham.

XXIX. With respect to the cargo, the power of the master is not so extensive as is his power over the ship; he cannot sell any part of the cargo, but in a case of absolute necessity. The case of *Freeman v. East India Company* is an important decision on this subject. (b) This was an action of trover for forty-two chests of indigo. At the trial, before Abbott, C. J., the following appeared to be the facts of the case. The goods in question, which were the property of the plaintiffs, were shipped at Calcutta, on board the *Cerberus*, for England; the vessel was wrecked off the Cape of Good Hope, and the greater part of the cargo was lost. Two hundred and twenty-five chests of indigo, however, were saved; and it did not appear that any part of them was materially damaged. The forty-two chests, which were the subject of the present action, were perfectly sound when they arrived in England. The indigo was sold by public auction at the Cape of Good Hope, being advertised as part of the cargo of the *Cerberus*, by order of the captain, who acted *bona fide*, according to the best of his judgment, and with a view to the benefit of all parties concerned. The vendees afterwards shipped the same to England, and they were deposited in the warehouses of the East India Company. The action was brought to try the right to the property, the purchasers having indemnified the present defendants. The Lord Chief Justice was of opinion that the captain of a ship was not justified in selling any part of his cargo, except in case of absolute necessity; and he

Of the power
of the master
to sell the
cargo.

*Freeman v. The
East India
Company.*

(a) 1 Doug. 219.

(b) 5 Barn. & Ald. 617.

Of the power
of the master
to sell the
cargo.

left it to the jury to say whether under the circumstances there was such a necessity. A verdict having been found for the plaintiff, a new trial was moved for; and it was contended, first, that the captain, under the circumstances, had authority to sell the cargo; and, secondly, that the sale having been in market overt, the property was thereby transferred to the vendee. It must be admitted that, though the captain is not the agent of the owners of the cargo, and that he is to be considered, as to them, a mere depository and common carrier; yet, under special circumstances, the character of agent and supercargo is forced upon him by the general policy of the law. Indeed, if a captain is not at liberty, under any circumstances, to sell the cargo, it will be impossible to find purchasers for cargoes in case of wreck. How can the purchasers learn whether the captain has any special authority to sell the cargo? The true question, therefore, which should have been left to the jury, was, whether, in this case, the captain had acted *bona fide*, according to the best of his judgment, in making the sale. But, secondly, this was a sale in market overt; and by the law of Holland, which prevails at the Cape of Good Hope, such a sale transfers the property to a vendee; and in support of this Van Leeuwen's Commentaries on the Roman Dutch Law, p. 400 was cited. Abbott, L. C. J., "The case of the Gratitude, which has been cited, was one where there was an hypothecation of the cargo by the master for the purpose of enabling the ship to go on with her voyage. But here the case was quite different; for the vessel having been wrecked, the object of the voyage was entirely at an end; and under these circumstances a sale of the cargo, or any part of it, by the master, could confer no title on the purchaser, unless there was an apparent necessity for such sale. That question I left to the jury; and they were clearly of opinion, that there was in this case no such apparent necessity. I also told them, that if the master was not authorised to sell, the purchaser could not acquire any title, unless by a sale in market overt, and then only where he was not acquainted with the circumstances under which the sale was made: but, upon the evidence in this case, it appeared that he was fully acquainted with them. If I was wrong in so leaving the case to the jury, there ought to be a rule granted. But I am still of the same opinion." Bayley, J., "I think the case was properly left to the jury, and that there ought to be no rule granted. The case depends on the extent of the authority which the master has over the cargo. It is a question of considerable importance: but, as it seems to me, not of any great difficulty. The master has a clear right, by the general

marine law, to hypothecate either ship or cargo, for the purpose of continuing the voyage: but beyond that he has no power, except in a *case of absolute necessity*. There may be, indeed, cases in which hypothecation would be useless and absurd. Suppose the ship were wrecked, and her materials alone were saved; or that the cargo was saved, being perishable, and there were no means of transshipment, in such cases an absolute necessity for sale would exist, and thereby the master would be forced to become the agent of the owners for the purposes of sale; but otherwise, he would only possess the right of hypothecation. The rule laid down by Holt, C. J., in *Johnson v. Shippen*, 2 Lord Raym. 984, is this, that the master has no authority to sell any part of the ship, and that his sale transferred no property, but that he may hypothecate; and this is cited and relied upon by Lord Ellenborough, in *Reid v. Darby*, 10 East 157. The case of absolute necessity constitutes the only exception to this general rule. Here there was no such necessity existing; and the sale, therefore, transferred no property to the defendant. As to this being a sale in market overt, it can make no difference; for as the purchaser knew the circumstances under which the sale took place, he must be considered to have bought at his peril, and to be liable, in case it ultimately turned out that no necessity existed, to have the sale vacated. Here, too, the indigo was bought not for consumption at the Cape of Good Hope, but to be sent forward to the place of its original destination. As to the hardships on the defendant, it does not exist; for he is clearly entitled to recover from the master the price paid by him for the indigo. This rule must, therefore, be refused."

Of the power
of the master
to sell the
cargo.

XXX. Upon a review of all these cases, it appears, that the authority of the master or captain to sell the ship or cargo may be summarily stated, and limited, as follows:—

1. That in a case of *extreme necessity*, and in such case only, can the captain or master resort to the sale of the ship; and in such case he should be provided with the strongest evidences of such necessity, in order to meet and rebut the jealousy and suspicion with which the courts of law always regard such an act of his power.

2. That a survey of the vessel made by the authority of a Vice-Admiralty Court, and a sentence of condemnation by such court consequent upon the report of their surveyors, are not of themselves conclusive evidence, (and still less authority,) of the extreme necessity of the vessel, required by law to justify a sale by the master. Upon which principle Lord Ellenborough, in *Andrews*

v. Glover, (a) said that he could consider such a proceeding only in the nature of an inquisition by the sheriff, having for its object the information of those who *claimed*, and who under certain circumstances had the power of selling the ship, and was in no degree conclusive upon the owner.

3. That those, therefore, who purchase of the master, under such circumstances, should be careful to provide themselves, not only with the ordinary titles of a ship, but with the evidences of the state and extreme necessity under which the vessel was sold; and when they became the purchasers. Such evidences are the petition of the master to the court for a survey, a commission of survey, report of surveyors; decree of the judge adopting the report, petition of the master for a sale, and a commission of sale, directed to the marshal of the court. Nor will all these be sufficient, if there be any thing in the conduct of the master, or in the biddings, price, or purchase, which can supply additional matter of suspicion to that jealousy with which the law always regards a transaction of this kind.

Of the authority to sell the ship under the new registry act.

XXXI. The new registry act contains a very salutary provision in the case of vessels rendered broken and unseaworthy in foreign ports. It enacts that if any vessel registered under the authority of this act, (b) or any other act, shall be deemed or declared to be stranded or unseaworthy, and incapable of being recovered or repaired to the advantage of the owners, and shall for such reason be sold by order or decree of any competent court; for the benefit of the owners of such ship or vessel, or other persons interested therein, the same shall be taken and deemed to be a ship or vessel lost or broken up, to all intents and purposes within the meaning of this act; and shall never again be entitled to the privileges of a British-built ship, for any purposes of trade or navigation. (c) The object of this clause is to prevent the fraudulent and collusive sales of ships by masters in foreign ports, upon an alleged necessity that they cannot be repaired;—as such ships are deprived of the privileges of a register, the temptation to buy or sell will scarcely exist, except in a fair case.

XXXII. Such, therefore, is the rule of law as regards the sale of the ship by the master. (d) As the value of the ship and freight,

(a) *Sittings after Trinity Term*, 46 Geo. III. at Guildhall, Lord Ellenborough, C. J. And see Abbott, 9; and *ante*.

(b) *Freeman v. The East India Com-*

pany, 5 Barn. & Ald. p. 617.

(c) 4 Geo. 4. c. 1.

(d) Some early cases of hypothecation, and some incidental observations by the court upon the power of the

from the extent of the injury which the vessel may sustain, may sometimes be deemed an insufficient security for the amount of the expenses of the repairs, the master, as we have already shewn, may hypothecate the cargo for the repairs of the ship when in distress in a foreign port; and even sell a part, in order to enable him to convey the residue to its destination. It should seem, however, that he cannot, under any circumstances, sell the whole of the cargo. But as to the general doctrine and the power of the master to hypothecate, or to sell a portion of the cargo for the repairs of the ship in a remote country, the reader is again referred to the celebrated judgment of Lord Stowell in the case of the *Gratitude*. (a)

XXXIII. The master, as we have before observed, is *de jure* the agent of the owner of the vessel, who is, therefore, bound by his acts as to all consequences resulting from the conduct of the ship; and it may be laid down as a general rule, that in all cases in which the master may hypothecate the ship, he may also hypothecate the freight. But he has no such extensive relation as to the owner of the cargo; being in that case only a carrier, unless specially constituted an agent. (b) Unless, therefore, in the case of extreme necessity, which requires the sacrifice or hypothecation in part or whole of the cargo as well as the ship, no act of the master can affect the owner of the cargo. (c) As he can only act for the presumed benefit of the owner, and as it can scarcely ever be for the advantage or profit of the owner that the whole cargo should be sacrificed, he cannot of course dispose of the *whole* by sale. It is doubtful even, whether he can act to that extent which, in cases of similar circumstances, but of a less valuable trust, the law would allow to an agent or servant, as being the presumable will of his master under the exigent circumstances of the case. Hence, though under an extreme case of difficulty or danger, it would be a reasonable presumption that the owner himself, if present, would direct a sale of the cargo, it is held to be still doubtful, in the courts of common law, whether a master should be entrusted with a power so open to abuse.

XXXIV. In *Campbell v. Thompson* (d) it appeared that the plaintiff had shipped goods on board of a vessel, which, by stress of wea-

The master is *de jure* the agent of the owner of the ship: but he is not, unless specially constituted, the agent of the owner of the cargo; but a carrier merely.

disposal of the ship by the master, may be found as follows. *Bridgman's case*, 12 J. 1. Hob. 11. Moore, 918. 1 Ro. Abr. 530. *Scarborough v. Lyras*, 3 Car. 1. *Latch*. 252. Noy 95. *Corset v. Neely*, 1 W. & M. Comb. 135. Rep. temp. Holt, 48. and *Boazen v. Jeffries*,

8 & 9 Will. 3. 1 Lord Raym. 152. *Lister v. Baxter*, 1 Stra. 695. *Mencitone v. Gibbons*, 3 T. R. 267.

(a) 3 Rob. 240. and see *ante*.

(b) Rob. 184. 151. and 156.

(c) 2 Rob. 251.

(d) 1 Starkie, 490.

ther, had been driven into the port of Halifax. Part of these goods, without any urgent necessity, had been sold there by the captain, in order to defray the expenses of repairing the ship. Whilst the vessel was engaged in this voyage, Metcalfe, the owner, made an assignment of the freight to the defendant. On the ship's arrival in the port of London, the defendant refused to deliver to the plaintiff the residue of his goods, unless he paid freight for the whole. The plaintiff insisting that he had a right to set off the sum for which the goods had been sold against the demand for freight, an agreement was mutually entered into by which the plaintiff agreed to pay the freight of the goods, when it should become due, and agreed also to accept a bill for the amount; the defendant engaging to indemnify the plaintiff, in case it should appear, between that time and the time when freight should become due, that the plaintiff had any claim for deduction. The action was founded upon a breach of this undertaking. It was contended, on behalf of the defendant, that the captain had a right to sell a part of the cargo, for the purpose of repairs: but Lord Ellenborough, addressing himself to this part of the case, said, "I desire that it may not go abroad that the master, as has been contended, has any right to dispose of goods on board the ship, except, indeed, in cases of *urgent necessity*. There is a paucity of authorities on this subject: but this has been so decided in a case which was tried before Lord C. J. Eyre. His Lordship refused to reserve the point, adding "that to save the question would imply that he entertained doubts upon it. (a)

(a) A new trial was afterward moved for in the K. B., and refused by the court.—See likewise *ante*, the case of the *Gratitudine*, 3 Rob. 204.

CHAPTER IV.

OF THE MARINERS.

HAVING treated in a former Chapter of the owners, part-owners, and the masters of ships, we now proceed to the mariners, under which head we shall consider, *first*, their general duties; *secondly*, their wages. Of the duties of mariners.

In order to regulate the duties of mariners, the Legislature has from time to time passed several acts of parliament, the principal of which are the 2 Geo. 2. c. 36. and 31 Geo. 3. c. 39. Upon a review of these statutes, the duties of mariners as required by law, and of masters in hiring them, may be stated as follows:—

The first rule is, that the contract for service must be made with the master, by a written agreement, signed by him and the mariners; such agreement to express their wages, and the voyage for which they are hired. The contract, thus signed, becomes the articles by which the seamen are bound to the master; and if a mariner, after having signed them, either refuses to proceed on the voyage, or deserts in the course of it, he forfeits to the owner all wages then due to him; and a justice of the peace may, on complaint of the master, owner, or person having charge of the ship, issue a warrant to apprehend him; and in case he refuses to proceed on the voyage, and does not assign a sufficient reason for his refusal, may commit him to hard labour in the house of correction, for not more than *thirty*, nor less than *fourteen* days. Any absence from the ship without permission of the master, or other person acting in command, is punishable by the forfeiture of two days' pay to Greenwich Hospital for every such day's absence. And whether the ship be upon a coasting or foreign voyage, if any seaman leave her without a written discharge from the master, or some person acting in authority for him, such seaman is to forfeit one month's wages to the chest at Greenwich. In a foreign voyage, the penalty attaches, if the mariner leave the ship at her port of delivery here, without such written discharge; and in a coasting voyage, if he leave her before the voyage is com-

Contract with seamen must be in writing, and signed by the master and seamen.

Articles of
agreement be-
tween master
and mariners
justify rea-
sonable cor-
rection.

Watson v.
Christie.

pleted, and the cargo delivered. Seamen, however, entering on board any of his majesty's ships, are exempted from these provisions. (a)

II. These articles of agreement between master and mariners always contain an express clause, that every lawful command which the master shall think necessary to issue for the effectual government of the vessel, and for suppressing immorality and vice of all kinds, be strictly obeyed, under the penalty of the person disobeying forfeiting his whole wages or hire, together with every thing belonging to him on board the vessel. Under this clause, added to the manifest necessity of the case, it has been adjudged that the master may exercise over his crew the authority of a master over his apprentices, and may give them reasonable and salutary correction; the law considering such correction to be a less punishment than the total forfeiture of wages stipulated by the articles. But on the other hand, the law having a due regard to the liberty of the subject, and to the different degree of the public interest concerned in the merchant and king's services, regards this exertion of authority with the greatest jealousy, and most strictly confines it within those limits, which are necessary to the safety of the ship, and the due progress of the voyage. Accordingly, in all cases, a seaman, who has been beaten or imprisoned by the master, may, upon his return to a British port, bring an action against him, to which the master must plead specially that the seaman had committed some particular fault, (specifying such fault,) and that he had corrected him only moderately for it. In *Watson v. Christie*, (b) it appeared that the defendant was the captain of a ship, and the plaintiff one of his crew; that the plaintiff, whilst under the defendant's command, had been so severely beaten by order of the defendant, that he had ever since that time been in a state of extreme ill health, and was likely to continue so during the rest of his life, which was still in some danger in consequence of the assault. On the other hand, it was offered to be proved, that the beating in question was given by way of punishment for misbehaviour on board the ship; and it was insisted that, as the conduct of the defendant, at the time of the assault, was necessarily in evidence, such conduct proved misbehaviour, and justified the assault. Lord Eldon, Chief Justice, said, that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining

(a) 2 Geo. 2. c. 36. s. 13.; and 31 Geo. 3. c. 39. s. 4. (b) 2 Bos. and Pull. 224.

discipline on board the ship, yet that such a defence could not be resorted to unless put upon the record in the shape of a special justification.

III. Should any mutiny occur on board a merchant vessel, the captain may resort to every necessary means of self-defence, and of subduing his crew. Should any seaman be killed or wounded in the course of such conflict, it is regarded in law as an act of self-defence. But though the captain may confine or put in irons a mutinous seaman, whether for the purpose of preventing the effects of his mutiny, or for bringing him to trial in England, he must not punish beyond reasonable correction, that is to say, he must not punish in the nature of a penal satisfaction at law. By the 39 Geo. 3. c. 37., all offences on the high seas may be tried under the Admiralty commission, and punished as if committed on shore. And by the 43 Geo. 3. c. 160. s. 78., all justices of the peace may receive information of murder, piracy, or robbery on the sea, and commit the offenders for trial.

Self-defence a justification for homicide in suppressing a mutiny.

IV. With respect to offences committed by mariners against the ship and cargo, they are of three kinds; namely, the offence of wilfully destroying the ship, of running away with the ship or cargo, or exciting a mutiny, and of not resisting pirates or enemies.

Three offences against ship and cargo, i. e. the destroying the ship, the running away with the ship, and voluntarily yielding it up to pirates and enemies.

V. The first offence, that of destroying the ship, having originated in the temptation afforded by the practice of insuring, was very early made felony by several successive acts of Charles, Anne, and George the First: (a) but the verbal description of the offence in these acts having been found insufficient in the case of *Easterby v. Macfarlane*, (b) they were all repealed, and the statute of 43 Geo. 3. c. 113. passed in their place. By this statute it is enacted, "That if any person or persons shall, from and after the 16th day of July, 1803, wilfully cast away, burn, or otherwise destroy, any ship or vessel, or in anywise counsel, direct, or procure the same to be done, and the same be accordingly done, with intent or design thereby wilfully and maliciously to prejudice any owner or owners of such ship or vessel, or any owner or owners of any goods loaden on board the same, or any person or persons, body politic or corporate, that hath or have underwritten or shall underwrite any policy or policies of insurance upon such ship or vessel, or on the freight thereof, or upon any goods loaden on

Destroying ships a capital felony by 43 Geo. 3. c. 113.

(a) 22 & 23 Car. 2. c. 11. s. 12.; & 7. And see *ante*,
1 Ann. stat. 2. c. 9. s. 4.; 4 Geo. 1. (b) *East. P. C. Addenda*, p. 26.
c. 12. s. 3.; 11 Geo. 1. c. 29. s. 5, 6,

board the same, the person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged a principal felon or felons, and shall suffer death, as in cases of felony, without benefit of clergy." It is further enacted by the second section, "That if any ship or vessel shall, from and after the 16th day of July, in the year of our Lord 1803, be wilfully cast away, burnt, or otherwise destroyed, within the body of any county of this realm, that then the said several offences, as well in wilfully casting away, burning, or otherwise destroying such ship or vessel, as in counselling, directing, or procuring the same to be done as aforesaid, shall and may be respectively enquired of, tried, determined, and adjudged in the same courts, and in such manner and form, as felonies done within the body of any county, by the laws of this realm now are to be, or by virtue of this act hereafter may be, enquired of, tried, determined, and adjudged; and if any such ship or vessel shall be wilfully cast away, burnt, or otherwise destroyed on the high seas, then that the said several offences, as well in wilfully casting away, burning, or otherwise destroying any such ship or vessel, as in counselling, directing, and procuring the same to be done as aforesaid, shall and may be respectively enquired of, tried, determined, and adjudged, before such court, and in such manner and form as in and by an act made in the 28th year of the reign of King Henry VIII., instituted for *pirates*, is appointed and directed for the enquiring, trying, determining, and adjudging of felonies upon the high seas."

VI. "And whereãs it is convenient that accessories to felonies committed within the body of any county within the realm should be by law liable to be tried, as well in the county wherein the principal felony was committed, as in the county in which they so became accessories; and also that accessories to felonies committed upon the high seas should be by law liable to be tried by such court, and in such manner as by the act made in the 28th year of the reign of the late King Henry VIII., is directed in respect to felonies done upon the high seas;" It is further enacted, "that from and after the said 16th day of July, in the said year of our Lord 1803, in all cases whatsoever in which any person or persons shall hereafter procure, direct, counsel, or command any other person or persons to commit, or shall abet any other person or persons in committing any felony whatsoever, or shall in any wise whatsoever become an accessory or accessories before the fact to any felony whatsoever, whether such principal felony be committed within the body of any county within this realm, or

upon the high seas, and whether such procuring, directing, counselling, commanding, and abetting, or otherwise becoming accessory or accessories before the fact shall have been committed or done within the body of any county within this realm, or upon the high seas, that then, and in all such cases, the offence of the person or persons so procuring, directing, counselling, commanding or abetting such felony, or so in any wise becoming accessory or accessories before the fact to such felony, shall and may be enquired of, tried, determined, and adjudged, in case such principal felony shall have been committed within the body of any county within this realm, by the course of the common law, either within such county wherein the said principal felony shall have been committed, or within the county wherein the said offence in procuring, counselling, commanding, and abetting, or otherwise becoming accessory or accessories before the fact shall have been committed or done; and in case the said principal felony shall have been committed upon the high seas, then the said offence in procuring, directing, counselling, commanding, or abetting, such felony, or of so becoming an accessory or accessories before the fact to the same, shall and may be enquired of, in and by such court, and in such manner and form, as in and by the said act made in the 28th year of the reign of King Henry VIII., is appointed and directed for the trying, determining, and adjudging of felonies done upon the high seas." The act, however, contains a provision that if an offender be tried by one jurisdiction, he shall not be again tried by another.

43 Geo. 3.
c. 113.

43 Geo. 3.
c. 113.

VII. The second offence, that of running away with the ship or cargo, or creating a mutiny, is likewise a capital felony. It is so made by an act of William III., and a further statute of George I. (a) which enacts, in substance, that if any master or seaman shall betray his trust, and turn pirate, and feloniously run away with a ship or merchandize, or shall voluntarily yield his vessel up to any pirate, or shall lay hands upon his captain, to prevent him from fighting in his defence, or shall confine his captain, and endeavour to make a revolt in the ship, he shall be deemed a pirate, felon, and robber, without benefit of clergy.

Running away
with ship or
cargo, and
making a
revolt in the
ship.

VIII. The third offence, that of not resisting enemies or pirates, is punished by an act of Charles II., (b) which incapacitates any master from having the future charge of any English vessel, who shall not have defended his vessel from pirates, such vessel being

Not resisting
pirates or
enemies.

(a) 11 and 12 Will. 3. c. 7. and 6
Geo. I. c. 12.

(b) 16 Car. 2. c. 6., and 22 and 23
Car. 2. c. 11. s. 10.

not less than 200 tons, nor furnished with less than 16 guns. The same act forbids him to yield without fighting to any Turkish pirate, not having double his guns. The seamen, who shall refuse to fight, are punished by the same act with the loss of their wages, their own goods on board the ship, and with an imprisonment and hard labour for a space not exceeding six months.

Encouragement to seamen.

IX. In order to encourage seamen to discharge their duty upon the occasion of ships being attacked by enemies or pirates, the Legislature has passed several acts, and created or enlarged several institutions, by which a provision is made for merchant seamen wounded or disabled in such conflicts, and for the widows and children of such as shall have been killed. By two of these acts, one of King William, and one of King Charles, (a) it is enacted that when any English vessel, which shall have been so defended against pirates or enemies, and in which conflict some of her crew have been disabled or wounded, shall arrive in port, the judge of the Admiralty, mayor, or other principal magistrate, shall summon four of the chief merchants of the town, and by their advice shall levy upon the owners of the ship and goods a reasonable compensation to the captain and crew for such defence: but such sum not to exceed 2 per cent. on the value of the ship, freight, and cargo.

Institutions by act of parliament for the relief of disabled and worn out seamen and their families.

X. These provisions for encouraging merchant seamen in the performance of their duty, and for relieving and supporting such of them as shall be maimed and disabled, and for supporting the widows and children of such as shall be killed or wounded in the merchant service, have been further extended by three more recent statutes; (b) the two first of which enact, that such seamen shall be admitted into and provided for in Greenwich Hospital.—The last statute (c) provides another establishment, and a permanent corporation for the more ample accomplishment of the same object. The enactments of these statutes, stated in a summary manner, are, that every merchant seaman, except only apprentices, fishermen employed in boats and coasters, pilots, and seamen employed by the East India Company, shall pay sixpence a month out of their wages to this corporation, to be deducted by the master, and by him paid over to the charity. That a corporation of merchants, who are named in the act, shall be the managers of the charity; and may purchase land, erect an hospital, and give

(a) 11 & 12 Will. 3. c. 7. s. 11. 22 29. s. 10. 20 Geo. 2. c. 28.
& 23 Car. 2. c. 11. s. 10.

(c) 20 Geo. 2. c. 28.

(b) 8 Geo. 2. c. 24. 8 Geo. 2. c.

pensions to all merchant seamen rendered incapable of service by sickness, wounds, or other accidental misfortunes, and may relieve the widows and children of such as are killed or drowned in the merchant service; such children, however, not to exceed the age of fourteen years, unless rendered objects of charity by blindness, lameness, or other infirmity. Nor is any one to be deemed a worn out seamen, who shall not have been five years in the merchant service, and paid the contribution. The master is required always to keep a muster roll of his crew, and to deliver a duplicate of it before sailing to the collector of this contribution at the port from which he is about to sail. The master must likewise keep an account or report of all casualties to any of the crew during the voyage; and, upon his return, must give a duplicate to the collector.

XI. There are other statutes for the relief of shipwrecked or abandoned seamen, (a) by which his majesty's ministers or consuls abroad, or, if no official character be there resident, two or more British merchants, are commanded to give subsistence to any cast away seaman in foreign parts, at the rate of sixpence a day, and to send them home with the first opportunity by some one of his Majesty's ships, or British merchant ships, sailing for England: every master of a British ship to receive, in case of need, four such cast away seamen for every hundred ton burthen of his ship, and to be paid sixpence *per diem* by the commissioners of the navy, for so many of them as he did not require to aid him in working his vessel. And if any master wilfully leave behind any of his crew, in any foreign part or distant British plantation, such men being in a condition to return with the ship at the time of her departure homewards, the master so offending is to suffer three months' imprisonment.

Provisions for the subsistence and sending home of seamen cast away in foreign parts.

(a) 1 Geo. 2. c. 2. c. 14. 11 & 12 Will. 3. c. 7.

CHAPTER V.

OF THE WAGES OF MERCHANT SEAMEN.

Seamen's wages.

HAVING considered in the preceding Chapter the general duties of the mariners, and of the master in hiring them, we proceed now to the consideration of the more extensive subject of seamen's wages. Under this head we shall have to explain, *first*, The mode of hiring seamen; *secondly*, That of earning their wages; *thirdly*, To what cases the law has annexed the forfeiture of their wages, in whole or part; and, *fourthly*, By what means they are recoverable at law.

And, *first*, As to the hiring of the seamen.

Written contract between master and seamen must declare the wages; and the contract must be signed by each seaman, but need not be sealed.

I. We have before stated that, by 2 Geo. 2. c. 36., made perpetual by 2 Geo. 3. c. 31., the contract between the master and mariners must be in writing, and that such contract must declare "what wages each seaman or mariner is to have respectively, during the whole voyage, or for so long time as he or they shall ship themselves for; and also must express in the said agreement or contract the voyage for which such seaman or mariner was shipped to perform the same." (a) This contract must be signed by each seaman within three days after he shall have entered himself on board the ship. Such contract need not be sealed; and in *Clement v. Gunhouse*, (b) where it appeared that a seal was affixed, it was ruled by Mr. J. Chambre, at Nisi Prius, that, though sealed, it was still regarded in law only as an agreement, and not as a deed, and must be sued upon as such.

Written contract necessary in the coasting trade: but need not be stamped.

II. The two statutes abovementioned (c) comprehended vessels

(a) 2 Geo. 2. c. 36. made perpetual by 2 Geo. 3. c. 31. This statute does not apply to the master's apprentices; and the penalty for not complying

with its provisions is *M.* from the master.

(b) 5 Esp. N. P. C. 83.

(c) 2 Geo. 2. c. 36. 2 Geo. 3. c. 31.

In case of certificate from last ship, that any seaman has not deserted, or in case of extreme hazard proved on oath, a master may hire seamen in the West Indies at more than double wages, without a licence from the governor.

Of the authority or licence given by the governor or other magistrate, in the West Indies, to hire seamen at more than double wages.

cordingly authorize or direct the same to be given by writing under his hand; that in such case the master or commander of such ship shall be at liberty to pay, and the seaman to receive, *such* greater wages as such governor, chief magistrate, or collector, shall *direct* as aforesaid.”(a) All such contracts to be void, and the master to forfeit one hundred pounds for any seaman so hired contrary to the provisions of the act. The same act, however, proceeds in a following section to make two exceptions, *first*, As to mariners producing a certificate of discharge from their last ship; and, *secondly*, In the case of necessity, hazardous service, or extraordinary duty proved upon oath, to mariners, who have not deserted from their last ship. (b) In both of these cases, the master is authorized to give more than double wages without the authority of the governor or other chief magistrate. The act then concludes by giving a form of the agreement between master and mariners, which its previous provisions require.

IV. The authority or licence, which the governor or other magistrate in the West Indies must give in pursuance of this act, must not only authorize the master to hire such seaman at more than double wages: but must specify the rate of wages, and give the distinct permission of the governor, or other chief officer, to hire the seaman at the sum so expressed. The object of the act is to prevent a competition of the masters amongst each other to seduce the crews; and, in order to prevent this mischief, the law removes the master from the contract in the first instance, and substitutes the discretion of the governor, or other chief officer, in his place. The governor, therefore, must fix the sum for which such seaman in the West Indies may be hired; and the master may then oblige himself to give it. Accordingly in *Rodgers v. Lacey*, (c) where a licence had been given by a magistrate in the West Indies, to the master of a ship, “*to procure men on such terms as he could, to navigate the ship home*,” it was decided by the court, that this was not a compliance with the terms of the act; such a licence, so generally expressed, and leaving so much to the master, being in no degree calculated to meet the mischief, for the prevention of which the 37 Geo. 3. c. 73. was passed; and that, therefore, a mariner could not maintain an action on a promise made in pursuance of such licence, to pay wages exceeding the amount of double the wages agreed to be given to a person in the like situation on the outward voyage.

(a) 37 Geo. 3. c. 73. s. 3.

(b) The same act, s. 10.

(c) 2 Bos. and Pull. 57.

Case of the
Vanguard.

no security in any department of life or of business, if servants could legally let themselves out in whole or in part."

VI. It seems unnecessary to add, that in these contracts, as in all others, any agreement in evasion or contravention of the law is void from the beginning, and cannot be sued upon in any court of law or equity. In the *Vanguard*, (a) the mate of a slave-ship having instituted a suit for his wages as mate and ostensible master of the ship, which was a union of characters contrary to the acts and the regulation of the slave trade, Lord Stowell said, that his agreement with the owners was *ex turpi contractu*, and as such could not be sustained in law. That the contracting parties, namely, the owners and the mate, were *in pari delicto*; and that therefore the one was not at liberty to set up the contract against the other, and to allege that he was induced by the other to enter into such illegal agreement. It was as much the duty of the one not to yield to temptation, as it was of the other not to propose an illegal temptation. In such a case the law refuses to interpose between them, and leaves them to avail themselves of their dishonest engagements as they can.

Owners of ships
are entitled to
the entire ser-
vices, as well
of the master
and the mates,
as of the ordi-
nary seamen.

VII. Upon the principle before mentioned, that the owners of the ship are entitled to the whole of the labour of their mariners, whether master, mate, or seaman; and that if any emergency shall require extraordinary efforts, such necessary exertions are still to be regarded as within the spirit of their contract; a mate, who may become master by some casualty during the voyage, must sue for his wages not as master, but as mate, through the whole time. His character of mate is not to be considered as merged in that of master: but the duties of the master are superinduced by the necessity of the case over his ordinary service as mate. (b).

Wages of sea-
men take pre-
cedence of bot-
tomry bonds.

The *Madonna*
D'Ibra.

VIII. The wages of mariners take precedence of bottomry bonds, and securities in the nature of hypothecation, the sailor being entitled against all other persons to the proceeds as a security for wages; and the subsistence of the seamen is considered in many cases to be a part of their wages. In the *Madonna D'Ibra*, Papaghica, (c) a Greek ship having taken up money on bottomry bonds, and being arrested in the port of London by the lender, the crew presented a memorial to the Earl of Liverpool, stating that they had been defrauded of their wages by the captain, and were left destitute of support. Upon this representation the

(a) 5 Rob. 207.

2 Rob. 281.

(b) *Favovrite*, *Nicholas de Jersey*.

(c) *Dod. 49*.

King's proctor received directions from the secretary of state's office, to take such steps as might be requisite to recover the wages due to the memorialists, who were in the mean time furnished with the means of subsistence, and afterwards sent to their own country by his Majesty's government. In consequence of the directions thus received, the King's proctor intervened in the cause on behalf of the mariners. The holder of the bonds and consignee of the cargo consented to pay the wages due to these men, but declined to defray the charges incurred for their subsistence. The ship was sold under a decree of the court, and the proceeds brought into the registry: but the amount was not sufficient to satisfy the demands of the mariners, and of the bond-holder. Lord Stowell, in his judgment upon the case, said, that it must be taken as the universal law of the Admiralty Court, that mariners' wages take precedence of bottomry bonds. "Wages are sacred liens; and, as long as a plank remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages. This is a principle universally admitted; and whoever enters into a contract, or advances money upon bottomry, must be presumed to do it with a full knowledge of the law upon this point. But, then, is the subsistence of these men to be considered as part of their wages? I think it is so to be considered; it is wages paid in another form, it is part of the compensation for their labour; and, according to the law of the country to which these men belong, subsistence in the intermediate time must be presumed to form part of the contract for the payment of wages. The parties must be subsisted till they return to their own country, unless some special reason is shewn to the contrary, such as desertion, or any kind of misconduct which would work a forfeiture of wages. There is, indeed, no proof of any special agreement upon this point in the present case: but it is very material that such a covenant should be presumed to subsist between the parties." The claim of the sailors was accordingly allowed.

Sailors' wages precede all other claims upon the ship; and in many cases subsistence is part of a sailor's wages.

Subsistence in many cases is part of a seaman's wages.

IX. We come now to our second head,—the earning of wages. The general rule, with respect to the seamen having earned their wages, is, that if the voyage be completed, freight thereby earned, and the labour of the seamen not rendered useless by the loss of the vessel by sea or capture, they have earned their full wages, and are entitled to receive them. If the vessel be lost, the seamen must share in the calamity with the owners; and the misfortune of the latter must not be aggravated by having to bear the whole loss, and to indemnify their fellow-sufferers under a disaster belonging in common to all of them. Every party must bear that

Of the earning of wages.

If the vessel be lost, the seamen lose their wages.

portion of the calamity which peculiarly belongs to him; the owners the loss of their ship, and the seamen the loss of their wages. Therefore, in the event of such loss, the seamen lose their wages, or are legally considered as not having earned them. But on the other hand, if a seaman be disabled in the course of the voyage by sickness or accident, he is still entitled to his wages; the law humanely considering that such cases are within the understood conditions of the contract between the master and mariners. (a)

Freight must be earned to entitle a sailor to wages.

X. The seamen, therefore, have earned their wages upon the due completion of the voyage and earning of freight. Nor can a master, unless in a very strong case of mutiny, or in such extreme and gross ill conduct as to endanger the ship, discharge any seaman during his voyage, so as to deprive him of his wages for the whole voyage; but such seamen, so discharged, will be entitled to his full wages up to the prosperous determination of the voyage, deducting, if the case require it, such sum as he may in the mean time have earned in another vessel. (b) But in an action by a seaman for his wages, where the master or owner intends to plead that no freight was earned, the onus of proving such plea lies upon such master or owner, and not upon the seaman. (c)

Impressed sailor or entitled to his wages up to the time of his impressment, if the ship earn her freight.

XI. That the contract of merchant seamen may not interfere with the public service, and that they may not be injured by any act of the state, it is expressly provided by the 2 Geo. 2. c. 36, that a seaman belonging to any merchant ship, who enters into the service of his Majesty on board of any of his Majesty's ships, shall not for such entry forfeit the wages due to him during the term of his service in the merchant ship, nor shall such entry be deemed a desertion. The principle of this provision is, indeed, so manifestly equitable, that it was acted upon previous to the late statutes in a case before Lord Raymond, where a seaman who was impressed from the merchant into the royal service was judged to be entitled to receive a proportion of his wages up to the time of impressing, *the ship having afterwards arrived in safety at her port of discharge.* (d) It is an equally manifest equity, that such an impressed mariner shall receive no further wages than whatever due at the time of impressment. In the *Jack Park, Little,* (e)

Impressed mariner is only entitled to wages due up to the time of his impressment.

(a) *Abernethy v. Laudale*, Doug. 539. *Chandler v. Grieves*, 2 Hen. Black. 606., and *Paul v. Eden*, K. B. B. T. 28 G. 3.

(b) *Robinet v. The ship Exeter*, 2 Rob. 261. *The Beaver, Grierson*, 3

Rob. 92.

(c) *Brown v. Milner*, 7 Taunt. 319.

(d) *Wiggins v. Ingleton*, 2 Ed. Ryms. 1211.

(e) 4 Rob. 309.

Case of a seaman dying upon the voyage.

Of the wages due to the representatives of seamen dying upon the voyage; and see *post*.

Of the claim for wages where the voyage is divided into parts.

of his service. (a) But this doubt seems at present removed by the direct authority of the 37 Geo. 3. c. 73. the fifth section of which enacts, that the master on his arrival out or home shall deliver a list to the collector of the port of all seamen "who have died during the voyage, and also a true account of the wages due to each seaman, mariner, or other person so dying, or the time of his death." And the 7th section of the same statute proceeds further to enact, that all such wages of seamen dying in the course of the voyage, shall be paid by the master "to the receiver of the sixpenny duty for the Greenwich Hospital, to the use of the executors or administrators of such deceased seamen;" and if any master shall neglect or refuse to pay over such wages within three months after his arrival, he shall forfeit 50*l*. for each offence, and also "double the amount of the sum of money so due to any seaman, mariner, or other person, for wages, as aforesaid." The above terms of the act may, therefore, be considered as an acknowledgment by the Legislature that such wages may be due and legally demanded; and the courts have acted upon this principle. Thus in *Armstrong v. Smith*, (b) where a master had paid 9*l*. to the receiver at Greenwich, for the full wages due to a mate who had died on the voyage, and his administratrix, insisting that 16*l*. more was due, brought her action for that sum. Sir James Mansfield acknowledged her right to bring the action, and the jury gave her the 16*l*. upon proof of 25*l*. being due.

XIV. The general rule of law being, that freight is the mother of wages, the seamen are deemed to have earned their wages in all cases in which the vessel has earned its freight. If a voyage, therefore, consist of parts, such as an outward and a homeward voyage, or several parts successively, the freight for each part being due when it is finished, the wages for that part would likewise be due, unless (as is usually the case) the contract stipulates for all the parts as for one voyage. (c) And if money be advanced to the owners in part of freight, the seamen may recover for

(a) See *Cutter v. Powell*, where the court refused the demand of a mariner's executors, because the sum agreed for as his wages, if he completed the voyage, was so large, as to have the air of being made in prospect of all casualties, namely, that nothing should be paid, if by any casualty he did not complete the voyage. The

court, however, observed, that if the plaintiff could have proved an usage to pay a proportional sum in similar cases, their decision would have been the other way. 6 T. R. 320.

(b) 1 Bos. & Pul. N. P. 299.; and see *post*.

(c) *Ld. Raym.* 639. 739.

their wages in the proportion of the sum advanced to the whole freight. (a) In all cases the question of wages turns upon the same principle, whether the ship have earned her freight or not. And in order to prevent any dispute with respect to dividing any voyage into parts, it is now usual to stipulate in express terms in the agreement with the seaman, that no officer or seaman, or person belonging to the ship, shall be entitled to his wages, unless the vessel shall return to, and arrive at the port of London, (supposing London to be her home port,) notwithstanding the ship shall at any time have broken bulk, or delivered any goods at any place or port whatever. This stipulation is intended to meet a difficulty which arose in the case of *Buck v. Rawlinson*, and *Edwards v. Child*, (b) upon which the Courts of Admiralty and Common Law were divided, whether the seamen were bound by a charter-party of the owners not to demand freight for the outward cargo, unless the ship likewise brought back her homeward cargo in safety. Indeed, in *Appleby v. Dods*, (c) it was determined by the Court of King's Bench, that the ordinary terms in a seaman's agreement, namely, that no seaman shall be entitled to wages until the arrival of the ship at her above-mentioned port of discharge, and her cargo delivered, were to be interpreted to mean the return of the ship to her port at home. (d)

Where it is stipulated that seamen shall not demand, or be entitled to, their wages, or any part thereof, until the ship arrive at her port of discharge, they cannot, on a loss before arrival, claim freight *pro rata*, on the ground that freight has been earned at an intermediate port.

XV. Upon the common principles of all contracts, if the seamen be hired, and the owners change their purpose of sending the vessel upon its voyage, the seamen are to be paid for the time during which they are detained. (e)

If seamen are hired for a voyage, and the owners detain the ship, they are nevertheless entitled to wages.

XVI. It has already been stated, that as wages follow the earning of freight; so the loss or capture of the ship, or its being disabled from earning freight in the course of the voyage, is attended with the loss of wages by the seamen. (f) In *Eaken v. Thom*, (g) the plaintiff, a seaman, made a claim of his wages, upon the ground that the ship had been compelled to discontinue her voyage only because she

(a) Anon. 2 Show. 283.

(b) *Buck v. Rawlinson*, 1 Bro. P. C. 102. *Edwards v. Child*, 2 Vern. 727.

(c) 8 East. 300.

(d) *Juliana (Ogilvie)* before Lord Stowell; ruled, that the seaman could not be deprived of his wages by any contract between the owner and freighter, *dehors* the agreement made with him, March 19, 1823.

(e) *Wells v. Osman*, 2 Ld. Raym. 1044.; and *Beale v. Thompson*, 3 Bos.

and Pul. 405.

(f) In *Hernaman v. Bawden*, 3 Burr. 1844., the ship had sailed to one place to take in a cargo to be conveyed to another; she arrived at the first place, but was lost with her cargo, in going to the other. The court decided, that no freight had been earned; and, therefore, no wages.—See *Yates v. Hall*, 1 T. R. 79.

(g) 5 Esp. N. P. 6. See likewise *Abernethy v. Landale*, Doug. 539.

But not if the ship discontinue her voyage on account of her being unseaworthy, and no freight be earned.
Seemle, a special action on the case may be maintained by a sailor under these circumstances.

Brown v. Moates. MSS.

Limitation of the general principle of law, that freight is the mother of wages.

was not seaworthy at her outset; and that, therefore, it was the fault of the owner, and not any accident of the sea or weather, which caused the failure of the voyage. But Lord Ellenborough said, that the cases had never made this distinction. The rule of law was general. The ship must perform her voyage to entitle the seaman to recover his wages; and if the owner sent her out under such circumstances as were stated, it should be the subject of a special action on the case: but he was of opinion that the sailor could not, on the ground stated, recover his wages.

XVII. In a late case, (a) a question arose upon this point. It was an action for seaman's wages. The ship went out in ballast, and the plaintiff was hired for the voyage at so much per month. The ship was discovered to be unseaworthy, and condemned as such in South America, in consequence of which she did not return or earn freight. It was contended for the plaintiff, that the unseaworthiness of the ship being the cause that no freight was earned, and this being nowise imputable to the plaintiff, he was entitled to wages, as he had performed his contract. Abbott, L. C. J. said, the law of this country is; no freight, no wages. This principle of maritime law is founded in the best policy; and if a particular hardship occur under it, as it sometimes does, it is well compensated by the substantial equity of the general rule. If the unseaworthiness of the ship prevented her from earning freight, this might be a ground of a special action on the case against the owners, as constituting a special grievance. But a seaman's wages can only be recovered out of a certain fund, namely, the freight earned in the voyage.

XVIII. It must be observed, however, that the maxim, *that freight is the mother of wages*, is not to be carried in all cases to such an extent, as to supersede the manifest principle of law and equity, that where one of the parties to a contract has performed all his duties, and the other, in consequence of such faithful service and performance, has received, not all the advantage which he expected, but some portion, the latter party should, under such circumstances, retain all *his* fruit of the service, whilst the *former* party, namely, the seamen, should lose the whole of their reward. Accordingly, where part of the freight has been earned, or part of the vessel saved, by the faithful service and dutiful exertions of the crew, it is but reasonable that the sailors should be paid their wages, provided that the fund saved be sufficient to pay such wages, and that the calamity of the owner be not aggravated by

(a) Brown v. Moates, Westminster, Easter Term, 1821.

having to indemnify those, whom he has a right to consider common participators in his risk, and common sufferers under the act of God. The maritime principle, that freight is the mother of wages, is founded upon the manifest good reason and policy, that the efforts of the sailors, in the preservation of ship and cargo, should be animated by a common interest. But this reason clearly admits the limitation, that, where the sailors actually perform their full duty, and where a part of the freight, or a part of the ship and cargo, are in consequence saved, they should under such circumstances receive their wages, and be encouraged to a like performance of faithful services under similar exigencies and dangers. The necessity of the limitation of the principle of the law, that freight is the mother of wages, is further manifest from the common cases of vessels seeking freight; that is to say, vessels sent in ballast on an outward voyage, upon the speculation that they may find homeward freight at a foreign port. It is here manifest that the sailors would be entitled to wages for the outward voyage, although the ship, being lost in ballast, could necessarily have earned no freight. And if the ship should perform both the outward and homeward voyage in safety, but should fail in obtaining freight altogether, the seamen would, notwithstanding, be entitled to their wages. (a)

Reason of the rule of law, that freight is the mother of wages.

XIX. This principle, and its limitation, are ably explained in the late judgment of Lord Stowell, in the case of the *Neptune*. (b) In this case, the petitioner Brown was hired as a seaman for the ship in question, and for a voyage "from the port of London, where the ship then was, to Rio de Janeiro, thence to Hamburgh, and back again to London." The petitioner, being so hired, and having signed the articles, sailed with the vessel upon the voyage in question in the month of February, 1822; and arrived at Rio de Janeiro on the 4th of June following, where the ship discharged part of her cargo, and thereby earned part of her freight. The vessel then took on board a cargo of sugar and coffee, and proceeded (with the petitioner as one of the seamen) on her voyage to Hamburgh: but, upon arriving off the French coast, was stranded on the shores of Brittany. It appeared that no part of the cargo could be saved, but that the petitioner, and the other seamen on board, most zealously and faithfully performed their duty in endeavouring to save as much as possible of the ship; and thereby did, in effect, save the mast, some rigging, some spars, an anchor

The case of the ship *Neptune*. MSS.

(a) Stated, *arguendo*, in the case of the *Neptune*, and not dissented from by Lord Stowell.

(b) High Court of Admiralty, February 17, 1824.

Judgment of
Lord Stowell
in the case of
the Neptune.

and cable, and some other articles, which were sold, and which produced sufficient money to pay the wages of the sailors. But on the part of the owners it was contended, that as the freight had been lost, and the mere wreck of the ship only saved, the seamen were not entitled to wages. Under these circumstances, the petitioner came before the Court of Admiralty and claimed that the court should order him to be paid his wages out of the proceeds of the articles so saved and sold. Lord Stowell, in giving judgment for the petitioner, said, That the question before the court, (by the admission of all the facts on both sides,) was narrowed to the point, whether the mariners were entitled to recover their wages out of the materials that had been saved. Now that they were not so entitled had been principally, and almost exclusively contended, on the authority of the well known maxim, that freight is the mother of wages. In affirmance of this maxim, a case had been cited from Siderfin, and a *dictum* of Molloy. But he had to observe, that both the precedents and the *dictum* referred to cases of total loss, and therefore were not exactly in point. Now the natural and legal parent of wages was the mariner's contract with the owners, and the faithful performance on his part of the covenants in such contract stipulated. He could not, therefore, admit this maxim as any other than one of those wise general rules, which, though just and applicable in the great majority of cases, must not be rigidly applied in those instances where a particular state of circumstances exempted such instances from the reason upon which the rule was founded; and, by such effect, took such cases out of the authority of the rule. The rule, according to the able remark of Lord Chief Justice Abbot, was founded upon the reason that it would cherish and invigorate the efforts of the mariners, and become an additional security for the safety of the ship and cargo. But does not this reason open the rule so as to admit an exception in cases *where the due service of the mariners has been the means of saving a part*? It is upon this reasoning, continued his Lordship, that the modern practice of all maritime states had departed from the application of the rule, where enough of the vessel has been saved to be applicable to the payment of wages. This was the understanding of France, particularly in her celebrated marine ordinances, promulgated in the reign of Louis XIV. The same principle was to be observed in the maritime laws of Spain in the height of her naval power in 1583;—of Holland likewise, in the ordinances of Rotterdam, eminently the first maritime state of Europe in one period of her history; and also in the naval code of Denmark. The court had been informed, on good authority, but *ex relatione* only, that a similar improve-

Where part of the vessel has been saved by the exertions of the mariners, and there is a sufficient fund thereby to pay wages, they are entitled to receive such wages, though no freight has been earned by the owners.

ment of the rule had obtained in America, (a country which had of late years very successfully turned her attention to the understanding of maritime law,) although there, no more than in our own books and decisions, were to be found any recorded cases in which the doctrine had been specifically recognized. Upon the grounds he had stated, he pronounced that this summary petition ought to be admitted; and that the mariners would have a right to such a portion of the materials saved as would satisfy their claim for wages.

XX. We have given the preceding case at length on account of the important principle which it establishes. It must be evident, that unless this rule, that freight is *the mother of wages*, be relaxed in some cases, great hardship and injustice would follow. In order, indeed, to uphold a general rule of law, it may be necessary to look particular hardships in the face; and rather to endure them, than to admit uncertainty into a general system by overturning an established practice: but it will always be expedient in such cases to resort to the foundation of the rule, and to see whether the policy on which it is established does not necessarily require and admit exceptions. That this is the case in the above rule of law there can be no doubt; as otherwise the sailors, who had used their faithful exertions to preserve the ship and cargo, would be in a very desperate condition in all cases in which the *entire ship and cargo* were not preserved. It is a general maxim that the crew cannot claim salvage; because it is their duty to protect the ship and cargo through all perils, and the whole of their possible service is engaged to the master and owners. This is a strong reason why they should be entitled to wages upon a partial shipwreck. Where would be the inducement of the mariners to act as salvors in any desperate extremity, unless the preservation of a part entitled them to wages. And how rarely does a case of salvage present itself, in which more than a portion (in nine instances out of ten a very small portion) is saved? If a vessel and cargo be entirely lost in a tempest, or by the perils of the sea, the maxim that freight is the mother of wages strictly applies. The safety of the ship being the mother of freight, and freight of wages, the common fund of all parties fails. The owners lose both ship and earnings, and the seamen the compensation of their services. But owners and freighters may protect themselves by insurance, whilst the policy of the maritime law will not admit a seaman to insure his wages. Under these circumstances, it seems but reasonable to allow him some compensation for his services out of the part of the wreck saved

The mariners
cannot claim
salvage.

Seamen cannot
insure their
wages.

by his faithful exertions. There is no decision in the common law courts, which expressly directs the payment of wages out of the reliefs and materials of the ship. (a) But it is recommended, in a very learned book, to encourage mariners to exert themselves in the hour of danger, by holding out the prospect of obtaining their wages, if they save so much of the ship as shall be sufficient to pay them. (b)

XXI. In the case of capture and re-capture, if the seaman be not separated from the ship, but continues on board of her, and completes the voyage, so that freight is earned, he is entitled to wages under his first agreement. (c) But if the seaman be separated, and afterwards so detained, that the master upon the re-capture is compelled to hire another to perform his duty, the master of course would not be bound to pay both; and, therefore, the detained seaman must lose his wages. (d) In the case of the *Aquilon*, *Beale v. Thompson*, (e) one of the vessels seized by the emperor Paul, but afterwards restored, and the crews replaced on board, the Court of King's Bench decided, that such an embargo was not to be regarded as an hostile capture; and, therefore, that the seamen who had been taken from their vessels, and marched up into the country, but who had been afterwards replaced on board their vessels, were not to lose their wages as if the vessels had been hostilely taken. And that the separation of the seamen from their vessels, not being voluntary upon their parts, but an act of violence by the Russian authorities, was not that kind of departure from the ship which was contemplated by the articles, and the acts of parliament upon which they are founded, as a case under which the seaman should forfeit his wages. The principle of this decision was further affirmed by the same court in *Johnson v. Broderick*, (f) another case arising out of the same transaction.

XXII. The time at which the seamen may demand their wages is settled by the express terms of the agreement now in common

(a) *The Neptune*, Admiralty Court, February 17th, 1824, appears to be the first case of the kind.

(b) *Abbott*, p. 437.

(c) *Bergstrom v. Mills*, 3 Esp. N. P. 36. But see *Chandler v. Meade*, 2 Lord Raymond, 1211.

(d) *The Friends*, Bell, 4 Rob. A. R. 143.

(e) 3 Bos. and Pull. 405.

(f) 4 East. 566. These cases were

removed to K. B. by writ of error from the Common Pleas. They afterwards came before the House of Lords on writ of error from K. B., when the judgment of K. B. was affirmed. 1 Dow. P. R. 299. And see *Pratt v. Cuff*, cited in *Thompson v. Rowcroft*, 4 East. 43.; and *Loweth v. Fothergill*, and *Delamainer v. Winteringham*, 4 Campb. 185, 186.

Beale v. Thompson.

Seamen violently detained by an embargo, and separated from the ship, but afterwards restored, and navigating the ship home, are entitled to wages during the whole time of their detention, such ship having earned her freight.

first case of forfeiture of wages is desertion from the ship. Such desertion was punished by the forfeiture of wages by an act as early as William the Third; (a) but which punishment is more expressly ordained by the 2 Geo. 2. c. 36. in which it is enacted, "That in case any seaman or mariner shall desert, or refuse to proceed on the voyage on board any ship or vessel, bound to parts beyond the seas, as aforesaid, or shall desert from the ship or vessel, to which he or they shall belong, in parts beyond the seas, after he or they shall have signed such contract or agreement, he or they shall forfeit to the owners of such ship or vessel the wages which shall be due to him or them at the time of his or their deserting from such ship or vessel, or obstinately refusing to proceed on such voyage."

The Pearl,
Denton.

XXVI. The Pearl, Denton, (b) is a principal case under this head, being distinguished by the peculiar circumstance, that the master had given permission to the crew to leave the vessel against the declared will of the owner. The sailors were hired by the master in the Downs, for the run to Hull, at twelve guineas per man; and they were in fact only three days occupied in that navigation. When the ship arrived in the Humber, the port of Hull was so full that the vessel could not enter immediately; and the master was induced to come to anchor in the Roadstead, where these men insisted on quitting the ship, as having completed their voyage. It was proved, that though the master permitted the mariners to depart, the owners expressly warned them not to leave the ship; indeed, the mariners themselves offered to remit a guinea of their wages, or to hire others. Lord Stowell, in giving judgment, said, That in order to support a claim of this kind, a mariner must prove one of two points; either the performance of the contract, or that some circumstance had intervened, which would equitably discharge him from its terms, and continue to him the benefit of a legal and virtual performance. The obligation of mariners is for the whole voyage, in the river as well as at sea; and if the port lies high up the river, a very considerable portion of their services may remain to be performed in the river. The contract for the voyage, therefore, was not performed in its terms. The next consideration was, whether there was any equitable ground for exempting the sailors from this compliance in terms, and the ground alleged was the consent of the master. The master undoubtedly had given this consent: but he had no authority to do so against the declared will of his owners. The owners

A master cannot give a sailor leave to absent himself against the declared will of the owners of the ship.

(a) 11 & 12 Will. 3. c. 7. s. 17.

(b) 5 Rob. 224.

1. A seaman who quits his ship after her arrival in port, but before she is moored, does not thereby subject himself to the forfeiture of his whole wages.

2. To entitle the master to deduct a month's wages for the benefit of G. H., it is incumbent on him to shew, that the seaman quitted the ship without leave in writing.

3. And such a deduction cannot be set off by the master, in an action for wages by the seaman, unless the master has previously debited himself to G. H., for the amount, in a book kept according to the direction of the statute 2 Geo. 2. c. 36. s. 6, 9.

of the whole subject of seamen's wages, that it will save much future explanation to give it at length. "An attempt has been made in this case," his Lordship said, "to put a new construction on the articles, (the articles between master and mariners,) which are in the usual printed form. Those articles provide that twenty-four hours' absence without leave shall be deemed a total desertion, and render every seaman liable to the forfeitures and penalties in the 2 Geo. 2. c. 36., and the 37 Geo. 3. c. 73. But this clause of the articles cannot be supposed to render seamen liable to the penalty imposed by those acts for desertion in cases to which the acts themselves do not apply. Now it is clear that the intention of the Legislature in inflicting a forfeiture of the seaman's whole wages for desertion by 2 Geo. 2. c. 36. s. 3. was confined to the case of his refusing to proceed on the voyage, or quitting the ship *abroad*, by which the master might be exposed to the necessity of hiring another person to supply his place at an exorbitant rate of wages. It is provided by the fifth section, that if any seaman shall absent himself without leave from the commanding officer, he shall forfeit two days' pay to the use of Greenwich Hospital. The meaning of these two sections is, that if the sailor run away before the voyage is commenced, or in ports beyond the seas, he shall forfeit his whole wages; if he absent himself during the voyage and return, he shall forfeit two days' pay. It having been found, however, that seamen were in the habit of quitting the ship after her arrival at the port of delivery, and before the ship was unladen, a clause was introduced authorising the master to deduct a month's wages where any seaman was guilty of such offence. And to prevent persons from setting up a pretended permission, it was provided that the permission should be in writing. But if the master make this deduction, he should immediately make an entry to that effect in a book to be kept for that purpose; which book must be signed by himself and two principal officers of the ship. Unless this be complied with, I do not see how the master is to avail himself of the deduction by way of set-off in an action for the wages. The next question is, whether the case were properly left to the jury upon the evidence? In cases of forfeiture, the best evidence of which the nature of the case admits ought to be given by the party who insists upon the forfeiture. It is said, however, that a negative cannot be proved: but there are many cases in which it may; and in this case it might have been shewn that the mate, who at the time had the command of the ship, had not given a discharge. It appeared, indeed, that the plaintiff went away at the same time with most of the other seamen, at a period when he might or might

the agreement; a total failure of their contract to complete the voyage; and therefore, that the entire right to wages was forfeited. Lord Stowell was of the same opinion, and decreed accordingly. He added, that the voyage was not completed, in the interpretation of law, by the mere fact of arrival: but that the act of mooring was an act to be done by the crew, and that the duty of the seamen extended to the time of the delivering of the cargo. That the forfeiture of the whole wages in such a case is not to be regarded as a mere penalty in law: but as a civil compensation for injury received, existing in all reason and justice antecedently to any statute upon the subject. (a)

XXXI. As respects the penalties and forfeitures claimed or retained by the master under the 2 Geo. 2. c. 36. it will be seen by Lord Avonley's judgment in *Frontine v. Frost* above reported, (b) that the master must enter such penalties in a book to be kept for that purpose, and must have such entries signed by himself and two or more principal officers: and, further, that he cannot make such deductions unless such entries have been duly made.

XXXII. In the case of seamen employed in the coasting trade, in vessels of one hundred tons and upwards, if any seaman should refuse to proceed on his voyage, after signing the article, he is to forfeit all the wages due to him at that time: but if he desert after the commencement of the voyage, and at any time before the delivery of the cargo, or before he shall have a discharge in writing from the master, he is to forfeit one month's wages to the use of Greenwich Hospital. (c)

XXXIII. Wilful absence from the ship, without leave, is in all cases, both as to coasters and others, to be punished by the forfeiture of two days' pay, for each day's absence, to the use of Greenwich Hospital. If the voyage in the coasting trade be for less than a month, the forfeiture of a month's pay, under the act, is to be considered as the forfeiture of the whole wages. (d)

XXXIV. But such forfeiture may, of course, be waived by the party interested; and therefore, in *Miller v. Brant*, (e) where a seaman was absent a day and a night from the ship, but having afterwards returned was received by the master and employed in his regular duties, it was decided by the court that the master had waived the forfeiture, and the seaman was entitled to recover his wages.

XXXV. In the case of desertion from a British ship in the

The master may waive the seaman's forfeiture of his wages.

(a) *The Baltic Merchant*, Edw. Adm. Rep. 86.

(b) See *ante*.

(c) See *ante*.

(d) 31 Geo. 3. c. 39. s. 9.

(e) 2 Campb. 590.

West Indies, the seaman, by the 37 Geo. 3. c. 73. is not only to forfeit all his wages as to the ship from which he deserted, but likewise as to the ship on board of which he has served.

XXXVI. It has been before stated, that by the 22 and 23 of Charles 2. c. 11. the crime of refusing to co-operate with the master in the defence of ships against pirates and enemies, is punished by loss of wages. And in the case of *Robinet v. The ship Exeter*, (a) Lord Stowell, in delivering his judgment, observed, that neglect of duty, drunkenness, and disobedience, existing in a gross and extreme degree, was sufficient to deprive a seaman of his wages. But the neglect of duty must be wilful, and amount to that degree of inattention which might expose the ship to danger. The drunkenness must have the same character—must be extreme and habitual—and not one or more of those acts of intemperance too common amidst the hardships of seafaring life. What the same learned Judge added, in the same case, as the description of what the court would regard as disobedience of orders, is at the same time so precise in itself, and so characterised by the knowledge of life and of the manners of men, that we shall consult the satisfaction of the intelligent reader by giving it at length. “As to disobedience of lawful commands, (says Lord Stowell) it is an offence of the grossest kind; the court would be particularly attentive to preserve that subordination and discipline on board of ship which is so indispensably necessary for the preservation of the whole service, and of every person concerned in it. It would not, therefore, be a peremptory or harsh tone, or an overcharged manner in the exercise of authority, that will be ever held by this court to justify resistance. It will not be sufficient that there has been a want of that personal attention and civility which usually takes place on other occasions, and might be wished, generally, to attend the exercise of authority. The nature of the service requires that those persons who engage in it should accommodate themselves to the circumstances attending it; and those circumstances are not unfrequently urgent, and create strong sensations, which naturally find their way in strong expressions and violent demeanor. The persons subject to this species of authority are not to be captious, or to take exception to a neglect of formal and ceremonious observances of behaviour; and, on these grounds, the court would hold, that the charges of this defence are of a nature sufficient to justify dismissal, if they are properly substantiated in evidence; although, it might, at the same time,

Gross neglect of duty by a seaman is subject to a forfeiture of wages.

The ship Exeter.

But if a seaman be wrongfully dismissed, or obliged to leave the ship on account of inhuman treatment, it will not amount to desertion, and he will be entitled to his wages.

A seaman does not lose his whole wages, nor *semble*, even a proportionable part, by another seaman embezzling the cargo.

Of the means by which seamen may recover their wages.

The master must sue the owners personally; he has no lien upon,

be proved that less personal civility had been used than would excuse something of an hesitation of obedience in other modes of life." But it has been determined that where, by a ship's articles, no wages are to be paid until the vessel reaches her ultimate port of destination, and the master wrongfully dismisses a seaman, the wages are payable immediately. (a) So, where a seaman sent on shore, on duty, requested permission to be permitted to stay there to get food, having had none in the course of the day; and, permission being refused, he remained there till the next morning, when he returned to the ship, but was not received; it was held to be no desertion. (b) Nor is it desertion, if a sailor leave a ship on account of inhuman treatment. (c)

XXXVII. In the case of any embezzlement or wilful injury to the cargo, the master may deduct the value of the injury sustained from the wages of those concerned. But such deduction must be made from those only guilty of such act of embezzlement, wilful injury, or gross negligence. And, therefore, in *Thomson v. Collins*, (d) it was said by the court, that the master could not levy a contribution on the innocent part of the crew for the misconduct of the others.

XXXVIII. We now proceed to the fourth head of seamen's wages, namely, the process of law by which, in the case of dispute, they may be recovered. And it seems scarcely necessary to say, that the suit for wages, if personal against the owners, and not *in rem* against the ship, can only be maintained against the parties signing the articles with the seamen, or the owners in actual possession. Therefore, it has been holden, that where a ship was mortgaged, but the mortgagor continued in possession, the master or seamen employed by the mortgagor could not maintain an action for wages and disbursements against the mortgagee, upon the ground that there was no privity of contract between them. For where there is an express contract with the mortgagor, the legal ownership of the ship becomes immaterial. (e)

XXXIX. It has already been stated, that the seamen, with the exception of the master, have in all ordinary cases a three-fold remedy—against the ship, the owners, and the master: but

(a) *Sigard v. Roberts*, 3 Esp. N. P. 71. per Lord Eldon.

(b) *Sigard v. Roberts*.

(c) *Linland v. Stephens*, 3 Esp. 269.

(d) 1 Bos. and Pull. N. R. 347.

(e) *Annett v. Carstairs*, 3 Campb.

356.; and see *Martin v. Paxton*, MS. in the 1st edition of this Work, p. 358. See also the new Registry Act, 4 Geo. 4. c. 41. ss. 43 and 44, which exempt mortgagees altogether from the debts of the ship.

that the master, from a just jealousy of the law, is excluded from any lien or claim upon the ship *in re*, and must, therefore, sue the owners personally in a court of law. The master's contract is personally with the owners: he trusts to their credit; and must, therefore, bring his action in the common law courts on the contract, and he cannot sue the ship in the Admiralty. Thus, in *Smith v. Plummer*, (a) it was determined that the master had no lien on the ship or freight for wages, or other disbursements on account of the ship. All the seamen, however, either singly or altogether, except the master, may sue in the Court of Admiralty, and may arrest the ship by the process of that court, as a security for their demand, or may cite the master or owners personally to answer them. By the term, *in all ordinary cases*, it is to be understood, that the seamen are hired in the usual manner, that is, by the usual articles, and not by a deed, or in any special or extraordinary manner. This, therefore, is the general rule as to the manner of suing for wages by seamen, as appears not only from all the cases hitherto stated, but from a series of them from the earliest times downwards, collected in the note below. (b)

XL. The jurisdiction of the Court of Admiralty, indeed, is, by its constitution, confined to causes and disputes arising upon the high seas; and, by two statutes (13 Rich. 2. stat. 11. c. 5. and 15 Rich. 2. c. 3.) is expressly commanded not to meddle in any thing *done within the realm*, nor with any contracts, pleas, and quarrels arising within the bodies of counties. But from the great advantages of the seamen being enabled to proceed in a court in which all may join in one suit, and may, moreover, have the ship as their security, the courts of law have given a liberal indulgence to this jurisdiction, and as large an interpretation as is possible to the restrictive words of the two statutes. And hence, if a party, having a good ground of prohibition, shall, nevertheless, suffer the cause to proceed to a judgment upon its merits in the Court of Admiralty, the courts of common law will not inter-

nor process in, the Court of Admiralty against the ship.

Seamen may arrest the ship for wages by suit in the Court of Admiralty.

Of the jurisdiction of the Court of Admiralty.

(a) 1 Barn. and Ald. 571. *Semble*, that a ship's surgeon cannot sue in the Admiralty Court for wages, 2 Dodson, 100. A Post Office packet may be arrested on a suit for seaman's wages, *ibid. ibid.*

(b) Ragg v. King, 2 Str. 858. 1 Barnard, 297. Clay v. Snellgrave, Salk. 33. 1 Lord Raym. 576. 12 Mod. 405. Carth. 518. Read v. Chapman, 2 Stra. 937. The Favorite,

De Jersey, 2 Rob. A. R. 232. Winch, 8. Allison v. March, 2 Vent. 181. Anon. 8. Mod. 379. Bius v. Parre, 2 Lord Raym. 1206. The Boatswain, King v. Ragg, 2 Stra. 858. 1 Barnard, 297. The Carpenter, Wheeler v. Thomson, 1 Stra. 707. The Surgeon, Sayer, 136. The Mate, Bayley v. Grant, 1 Lord Raym. 632. See also 2 Dods. 11.

tere afterwards, nor allow him to avail himself of an objection which they regard him as having waived. (a) "Indeed, if the master, (says the learned writer to whom this subject is so much indebted,) have obtained a sentence in the Court of Admiralty upon the usual allegation, stating that he was hired within the jurisdiction of that court, the courts of Westminster-hall will not prohibit the execution of the sentence." (b)

XLI. Nor are the seamen, in suing in the Admiralty Court, confined to their actual service at sea; they may sue likewise for their wages earned in rigging and fitting out a ship for a voyage, though the owners have not prosecuted such voyage. (c) They may sue likewise in the same court for the wages of a coasting voyage, or for navigating a vessel from one port of England to another; (d) and if the subject come before the Court of Admiralty in a suit instituted, the court may decide whether a place at which a ship shall have arrived be such a determination of the voyage as to entitle the seaman to wages. (e)

The Court of Admiralty extends to foreign seamen.

XLII. The Court of Admiralty will extend to foreign seamen, whose ships are in a British port, the advantage of the same remedy against their ships for wages; but will not entertain such a suit, where the contract is of a special kind, necessarily referring to their own laws; such law not being incorporated in the contracts, and, therefore, not before the court. But if foreign sailors, before the commencement of a voyage, stipulate in their own country that they will not sue the captain for any money abroad, they cannot maintain an action against him for wages in the courts of this country. And the 2 Geo. 2. c. 36. does not apply to the case of British seamen entering on board a foreign ship in a British port. (f)

XLIII. As the master, though an agent and servant of the owners, has a distinct interest from them, in any suit against the owners, he may be a witness in their behalf in an action for sailors' wages. (g)

XLIV. Such, therefore, is the rule and the practice in actions for their wages by seamen, namely, that all except the master may

(a) *Buggin v. Bennet*, 4 Burr. 2035.

(b) *Barber and Another v. Wharton*, 2 Lord Raymond, 1452. Abbott, 485.

(c) *Wills v. Osman*, 2 Lord Raymond, 1044. 6 Mod. 238. *Mills and Another v. Gregory, Sayer*, 127.

(d) *Anon.* 1 Vent. 343.

(e) *Brown v. Benn and Others*, 2 Lord Raymond, 1247.

(f) *The Courtney*, English, 1 Edw. 239. *Johanson v. Mackielsen*, 3 Campb. 44. and *Dickman v. Benson*, *ibid.* 290.

(g) *The Lady Ann, Wardell*, 1 Edw. 235.

Where there is any thing out of the usual course (whether by the contract for wages being under seal, or containing special covenants) the Court of K. B. will issue a prohibition, if the application be made before sentence, and the Court of Admiralty refuse to receive the plea.

Bench granted similar prohibitions upon the authority of the above case. In the former of these cases, the motion for a prohibition was founded upon an allegation that the contract of the seamen was of a special nature, and was, moreover, made on land, in this country, and sealed and delivered by the parties; and that the defendant in the Court of Admiralty had offered to prove such specialty, and had alleged such deed, but that the judge of that court had altogether refused to receive the plea and allegation. Upon these grounds the prohibition was accordingly granted by the Court of King's Bench. Lord Hardwicke, Chief Justice, said, that as the Admiralty Court proceeds in suits for mariner's wages upon contracts made at land, which cannot be the proper cognizance of the maritime jurisdiction, merely by indulgence, a prohibition would always be granted where the contract differed from the common and usual contracts between masters of ships and seamen about wages, by reason of some special terms contained in it; and that in this agreement there seemed to be some special covenants, as, for example, 1. That if the mariners should enter into any of his Majesty's ships of war, they should forfeit their wages; which was directly contrary to a clause in the late act. And, 2. That where the agreement was by writing, signed and sealed, there also a prohibition should go, which was likewise the present case. (a) In *Howe v. Napier*, the prohibition was likewise granted; and Lord Mansfield observed, that this case differed from the ordinary contract for seamen's wages in other particulars besides the seal.

XLVI. As the agreement under which the seamen are hired always remains in the possession of the master or owners, and the seamen might be delayed, if not defeated, in their claim for wages, if it were necessary for them to produce it, it is expressly directed by the 2 Geo. 2. c. 36. and the 31 Geo. 3. c. 39. that when it becomes necessary to produce the contract in court, it shall be so produced by the master or owners of the ship, and that no seamen shall fail in any suit or process for the recovery of wages for want of the production of it. In the usual action in the Admiralty by seamen for their wages, the suit is rested upon the service, and not upon the hiring; and, therefore, the contract upon which such seamen are hired, whatever it may be, is not necessarily produced in the Court of Admiralty. And this, indeed, is the reason why, if a master or owner intends to avail himself of the plea of a deed or

(a) Abbott, 489. See also 2 Dodson, p. 11. "The Court of Admiralty has no jurisdiction over cases of sea-

men's wages, when founded on special or extraordinary circumstances." *Sydney Case*. Per Lord Stowell.

Summary proceedings to enable seamen to recover their wages, if under twenty pounds.

powers justices of peace, on the complaint of seamen, to hear and settle disputes about wages, not exceeding twenty pounds. And if the owners or masters shall refuse to comply with the determination of the justices, the amount of wages which they shall adjudge to be due may be levied by distress upon their goods and chattels. And the determination of the justice or justices is to be final, unless an appeal be interposed by either party to the High Court of Admiralty, within the space of seven days after the order made. The act provides, that if seamen or others are dissatisfied with the order of the magistrates, they must give notice of their intention to appeal to the High Court of Admiralty, within forty-eight hours after the order made. A monition is to be taken out against the adverse party within thirty days; and good and sufficient bail, in double the amount of the wages claimed, must be given before a commissioner of prizes, or the justice who shall have pronounced the order. This bail is to be certified, according to a form given in the schedule, and transmitted without delay to the High Court of Admiralty. Seamen, however, are not to be precluded from the benefit of any agreements entered into before the passing of the act; nor of any other remedy to which they may now resort.

other ports of the kingdom generally, will be found useful for reference. But they afford more matter of general regulation than of law; and, being the daily course of business amongst masters, belong rather to their books of practical navigation.

Masters or owners, or part owners, residing at Dover, Deal, or the Isle of Thanet, may pilot their own ships in the Thames or Medway.

III. But the reason of the law in thus requiring masters to take pilots, being to secure owners against the too common confidence of masters in themselves, the law now dispenses with the rule in certain cases where the reason does not apply. Accordingly a clause is introduced in the 52 Geo. 3. c. 39. s. 33., by which certain persons, namely, masters, and owners or part-owners, residing at Dover, Deal, or the Isle of Thanet, are allowed to conduct their own ships up or down the rivers Thames or Medway, or into, or out of, any port or place within the jurisdiction of the cinque-ports. This clause was introduced after the judgment of the King's Bench in the case of *Kimber v. Blanchard*, (a) in which the court determined that under the acts preceding the 52 Geo. 3. c. 39., a master who shall conduct his own ship was within the penalties of the pilot acts. (b)

IV. Upon the same principle in *Rex v. Lamb*, and *Rex v. Neale*, a doubt having existed among masters of ships, though not adopted by the court in the trial of these cases, whether a master could under any circumstances move a vessel from her original moorings, a clause was introduced in the twenty-second section of the 52 Geo. 3., by which it was provided, "That nothing in this act contained shall be construed to prevent any ship or vessel which shall be brought into any port or ports in *England*, by any pilot duly licensed, from being afterwards removed in such port or ports by the master or mate, or other person belonging to any such ship or vessel, and having the command thereof, or if in ballast, by any other person or persons appointed by any owner, or the master, or any agent of the owner, for the purpose of entering into or going out of any dock, or for changing the moorings of such ship or vessel."

Rates of pilotage.

V. The rates of pilotage are in almost all cases settled by the 52 Geo. 3. c. 39.: but, where the statute is silent, are to be regulated by the usage of the port. The rates to be paid for pilotage within the rivers Thames and Medway, and in the channels leading thereto, to pilots licensed by the corporation of the Trinity House, are enumerated in a table annexed to the statute. And in the same manner in a second table, the rates to be paid

(a) *Kimber v. Blanchard*, 2 Black. 690. 5 Burr. 2602.

(b) *Rex v. Lamb*, 5 T. R. K. B. 76. *Rex v. Neale*, 8 T. R. K. B. 241.

Any person may be employed as a pilot to assist ships in distress.

Particular exemptions from taking a pilot.

Coasters and ships not exceeding the burthen of 60 tons—if registered.

Limitation of the responsibility of owners and masters, when pilots are on board, by 52 Geo. 3. c. 39.

of any port or place for which pilots are or shall be appointed,) in passing up and down the English Channel; or elsewhere, in passing by any part of the coast of England, in the course of any voyage; or within the limits of the port to which such ship belongs, (such port not being theretofore regulated in respect to pilotage, by any charter or act of parliament,) and may employ any person as pilot, or act themselves as such, in cases where no duly qualified pilot offers; and no person shall in any case be liable to a penalty when employed as pilot in assisting ships in distress.

VIII. Besides the above exemption from the necessity of taking a pilot under this act, namely, that of a master conducting his own ship, the second and twenty-ninth sections exempt, "as well all colliers, as also all ships and vessels trading to *Norway*, to the *Cattegat*, and to the *Baltic*, and likewise round the *North Cape*, and into the *White Sea*, and all constant traders inwards from the ports between *Boulogne* inclusive, and the *Baltic*, such ships and vessels having British registers, and coming up the *North Channel* by *Orfordness*, but not otherwise; and likewise, all coasting vessels, and all *Irish* traders, using the navigation of the river *Thames* as coasters; and ships not exceeding the burthen of sixty tons, having *British* registers." But a vessel trading to and from London to Belfast, and proceeding down the *Thames* on her voyage to the latter port, and not laden with corn, grain, meal, flour bread, or biscuit, is not within the sect. 2. of the 52 Geo. 3. c. 29., which exempts from the obligation of taking a pilot on board, all coasting vessels and all *Irish* traders using the navigation of the *Thames* as coasters. (a)

IX. In *Usher v. Lyon*, (b) it was decided that coasting vessels were not compellable to take pilots on board on entering rivers within the limits of a jurisdiction having authority to appoint and license pilots; and that the exemption in the 52 Geo. 3. c. 30. was not confined to coasters using the navigation of the *Thames* alone.

X. By the twenty-sixth section it is enacted, "That owners and masters shall not be responsible for loss or damage, nor shall owners or consignees be prevented from recovering upon any contract of insurance, or other contract relating to any ship or vessel, or any cargo on board the same, by reason of no pilot having been on board such ship or vessel, unless it be proved that the want of a

(a) *Davison v. Mekibben*, 3 Brod. & B. 112.

(b) 2 Price, 118; and *ante*.

To be examined
as to their com-
petency by
commissioners
duly appointed.

No more than
two licensed
boatmen to go
in each boat.

Penalty on a
boatman refus-
ing to take a
licensed pilot
on board a ship.

fifty of such boatmen shall constantly reside at Dover, fifty at Deal, twenty at Ramsgate, and twenty at Margate; and all such boatmen shall be respectively required by such licences to reside at the respective places to be specified, and shall, upon quitting their places of residence or neglecting to use or act under the same for the space of two months, unless prevented by illness, forfeit such licences; and every such boatman, before licence be granted, shall be examined as to his knowledge of the coast, and ability to conduct ships and vessels into the Downs and the harbours of Dover, Ramsgate, Margate, and Folkestone, by the commissioners of the lord warden of the cinque ports for settling salvage, and the other commissioners appointed by this act, at the respective places where such boatmen shall apply to be licensed, at a meeting to be held for the purposes of this act, upon whose certificate the lord warden or his lieutenant, or the deputy lieutenant governor of Dover Castle, or such other person authorized as aforesaid, shall be empowered to grant such licences; and if the number of persons so approved and qualified to act as such licensed boatmen shall exceed the number prescribed by this act, the names of the persons so approved and qualified shall be entered in a book to be provided for that purpose, together with the times of their approval and examination, in order that they may regularly succeed, by rotation, to the vacancies that may from time to time occur by death or forfeiture of licences or otherwise, in order that the number of licensed boatmen may at all times be complete. And by the tenth section it is enacted, that no more than two licensed boatmen shall be allowed to go in each boat; and whenever any such licensed boatmen shall be cruising, without any licensed cinque port pilot, and fall in with any ship or vessel requiring a licensed cinque port pilot, one of the licensed boatmen shall be left on board the ship or vessel wanting such pilot, as a guarantee for a proper pilot being brought or sent off the shore to such ship or vessel; and the boatman so left shall not be entitled to any sum of money or payment for being so left, or being on board. And by the thirteenth and fourteenth sections it is enacted that every licensed boatman who shall, on being applied to by any licensed cinque port pilot, to take him off to any ship or vessel, refuse so to do, unless prevented by illness, shall, upon due proof thereof, in the place where he shall be licensed, forfeit his licence, and any sum not exceeding twenty pounds for each offence. And if any pilot whose turn it shall be to go off on duty shall refuse or neglect so to do on being applied to by any licensed boatman, such pilot shall lose his turn, and the ship or vessel shall be piloted

by any duly licensed pilot who shall first get on board, but which shall not be taken for the turn of duty of such last-mentioned pilot.

XIII. It appears scarcely necessary to add, except, that a principal case was once determined upon it, that a British pilot cannot sustain a suit for wages for navigating a foreign ship to an enemy's port. In the *Benjamin Franklin*, (a) the case had some singularity, as this objection was taken by the judge, instead of being suggested in the defence. It was a suit brought for wages on the part of J. Gillman, a British pilot, for conducting a ship, being an American vessel, from the Downs to Flushing. The demand was resisted, on a suggestion of want of skill in running the vessel on a sand, by which considerable damage was sustained. But Lord Stowell stopped the case upon its statement, on the ground that a suit could not be maintained on the part of a British subject for services performed in aiding the commerce and importation of the enemy. Would not such services be a contribution of their skill and experience to assist and promote the navigation of the enemy's ports? That pilots may often engage in such services will be of little signification. They may be disposed to undervalue the obligation of abstaining from all traffic with the enemy, and to risk their own personal safety for the sake of gain. But a court of justice will not so consider it, nor give any support to demands arising out of a course of navigation which must be pronounced to be illegal to a British subject.

British pilot cannot sustain a suit for wages for navigating a foreign ship into an enemy's port.

The *Benjamin Franklin*.

XIV. In the *Leander*, Murray, (b) the court carried this principle still further, Lord Stowell laying it down as a general rule, that not only the pilot, but all the seamen, must lose any claim to wages, where the ship was engaged in any trade or enterprize contrary to the law of nations. As this case bears upon a traffic too common at the present period, it may not be without utility to relate it more fully. It was a suit for wages, instituted on behalf of James Minus, who was shipped at New York, in January, 1806, by Lewis, the former master, as a seaman on board this vessel, at twenty-six dollars per month, of which he received a month's pay in advance. The ship was one of those employed in the expedition against Spanish America, under General Miranda; and upon her arrival at a port, in the island of St. Domingo, which was within a month from the time of the shipment of Minus, several of the crew were permitted to volunteer their services in the military department of the expedition, and Minus then entered as an artillery

Where a ship is engaged in any trade or enterprize contrary to the law of nations, the PILOT, as well as the seamen, forfeit all claim to wages.

(a) 6 Robinson, 350.

(b) Edwards, A. R. p. 35.

man. It was agreed between the master and those of the crew who volunteered, that from that period they were to cease to be considered as seamen, and were to receive a quarter dollar per day, and a gratuity of prize money, and land in case the expedition succeeded: but the pay and prize-money were to depend on that event. The expedition having failed, Captain Lewis and several of the crew left the ship; and she afterwards proceeded to Trinidad, and was there sold to the present owners. The remainder of the crew were paid at the time of the sale, as far as the funds of the former owners would extend, and gave full discharges for the whole amount of their wages. But no demand was made by Minus, or any of those who had volunteered in the military department, as it was understood that their claim to remuneration was extinguished by the failure of the expedition. Minus, sometime after, claimed wages of General Miranda: but, on being informed that he was not entitled to any, he commenced these proceedings against the ship. Lord Stowell, in his judgment, said, This question arises on the admission of a defensive allegation offered by the owners of this vessel, in answer to a petition for wages. It appears that, at the time this person entered into the service of the ship at New York, as a mariner, she was the property of American owners, but that the vessel has been since transferred to British subjects. Now, although it is a settled principle for the protection of mariners generally, that wages form an indelible and perpetual lien on the ship, and follow her wherever she goes, it is easy to see the great inconvenience that might arise from carrying this principle to its full extent in the case of foreign purchases. Where an English ship is purchased by English merchants, the purchasers have an opportunity of becoming acquainted with all the circumstances of the antecedent history of the vessel: but, in making purchases of this description, it is scarcely possible for them to inform themselves of all the transactions, regular or irregular, in which she may have been engaged. And I should, therefore, be extremely unwilling, without further consideration and examination of the subject, to lay down universally, that it is a principle which this court is bound to act upon under all circumstances with respect to ships purchased of foreigners by British subjects, or by foreigners of British subjects. The allegation now offered states many circumstances which are dissembled in the summary petition. It appears that no less than one hundred and eighty men were engaged on board the vessel, and that the agreement was for a voyage from New York to St. Domingo, and back again to America; whether to North or South America, is

ers are not liable for any damage or loss occasioned to the ship, cargo, or to any other vessel, unless such damage or loss be occasioned by their own default, or that of the crew.

The pilot himself is answerable for gross neglect, or incompetency.

Bennett v. Moita.

in running down another ship, unless, indeed, express evidence be given, that the master superseded the pilot in the management of the ship, and that the fault was occasioned by himself or crew. In *Bennet v. Moita*, (a) the ship *Ranger* had taken a pilot on board, off Gravesend, to navigate her to her moorings, near Rotherhithe; in the course of proceeding to this place she was run foul of by the defendant's brig the *Carvalto*, the *Carvalto* at that time having an old experienced pilot on board. The counsel for the defendant objected, that the action could not be maintained, the *Carvalto* having a pilot on board, by whom the authority of the master was divested. He supported this objection upon the 52 Geo. 3. c. 30. s. 30. (before cited) by which it is provided, "That no master or owner of any ship or vessel shall be answerable for any loss or damage; nor shall any owner or owners of any ship or vessel or consignee of goods be prevented from recovering any loss or damage upon any contract of insurance of the same, or upon any other contract relating to any other ship, or vessel or any cargo on board of the same, for or by reason or means of any neglect, default, incompetency, or incapacity of any pilot taken on board of any such ship or vessel under or in pursuance of this act." It was contended on the other side—1. That the act did not extend to ships in the river Thames. The act was intituled "an act for the more effectual regulation of pilots and pilotage of ships and vessels on the coast of England." Now, the term *coast* was properly confined to the shores of the sea. Had rivers been intended,—would not the act have used the characteristic word *banks*? 2. That the statute did not prevent an action being brought against the captain; and that, at any rate, to exculpate the captain, it should be shewn that the accident arose from the negligence or incapacity of the pilot. But Gibbs, C. J. determined both points in favour of the defendant. He said, that the act manifestly extended to the river Thames; and the pilot being on board, and the authority of the master thereby divested, the latter ceased to be responsible when he ceased to act. If a pilot were grossly incompetent he

(a) Holt, N. P. 359.; and 7 Taunt. 259.—See likewise *Boucher v. Noidstrom*, 1 Taunt. 668. *Nicholson v. Mounsey*, 16 East. 384.—See likewise *Cotts v. Herbert*, 3 Stark. N. P. 14. Case for negligently running foul of a vessel.—Defence, that the defendant's vessel was under the management of a pilot.—L. C. J. Abbott said

that it was still a question of fact for the decision of a jury, whether the mischief had been occasioned by the incapacity of the pilot.—Did the pilot, in fact, take upon himself the management of the vessel. If the pilot had *legally* the management of the vessel, the master and owners were not answerable.

ral pilot act,) discharging masters and owners of vessels having pilots on board from responsibility for damages occasioned by the neglect of the pilot, did not apply to vessels having on board pilots appointed for *other places* than those *expressly named* in the preamble and provisions of that act. They thought, however, where that act did apply, that the crown was equally bound with the subject. Indeed, the 52 Geo. 3. has always been considered as an act in relief of the general responsibility of the master and owners of ships, having pilots on board in pursuance of its provisions. Therefore, in *Ritchie v. Bousfield*, before cited, (a) the Court of C. P. decided that the exemption of the master, &c. from responsibility by the thirtieth section of that act was not confined to loss or damage happening to the piloted ship and cargo : but extended to damage done by that ship to others.

Of the pilot's
responsibility.

*Slater v.
Burgess.*

XVIII. We have already said, that a pilot is answerable for general negligence and incompetency : but his liability does not extend so far as that of the master and owners. Carriers, whether by sea or land, are in the nature of insurers ; and are answerable in all cases, except the act of God and the King's enemies, unless protected by special agreements. Pilots are not responsible to this extent ; they are bound to have competent skill and ability, and to exercise their functions with diligence and discretion : but they are not insurers, and are not, therefore, responsible for miscarriage or accident, unless occasioned by their negligence or wilful default. Thus, in *Slater v. Burgess*, (b) where a vessel was placed under the management of a cinque port pilot, and ran foul of another vessel in a dark and foggy night, but under such circumstances, that no reasonable blame was imputable to the pilot ; Dallas, L. C. J. said, that the master and owners were exempted under the general pilot act, because they had taken a pilot on board under the compulsory clauses of that act ; and that with respect to the pilot, the only question was, whether he conducted himself with that proper skill and ability which he owed to those who employed him ? That he exercised a profession of art, and was therefore responsible for misfeasance : but that he was not liable to make good a loss occasioned by ordinary misadventure or miscarriage. If he was guilty of positive default or negligence, or wanted the proper skill and competency of a person in his situation, he would be responsible ; otherwise not. The jury found a verdict for the defendant.

(a) 7 Taunt. 309.; and see *ante*.

after Trin. Term, 1820. See likewise

(b) Before Dallas, C. J., Sittings sect. 31. of 52 Geo. 3. c. 29.

CHAPTER VII.

OF CONVOY.

Of the reason
of the convoy
acts.

SHIPS and their cargo being a species of property of no less importance to nations than to their individual proprietors, and being often of a character, the capture of which would add to the hostile means and power of the adversary, the Legislature has imposed restraints during a period of war, the object of which is to prevent them from falling into the hands of the enemy.

I. With this purpose the law requires all captains and masters, unless in certain excepted cases, to sail with convoy. Accordingly, at the commencement of every war, it is usual to pass an act of parliament, prescribing and regulating the stations of convoy, and the duties of captains to sail with them: but which act necessarily expires with the war which gave occasion to it. The last of these acts was the 43 Geo. 3. c. 57. which expired upon the conclusion of the late peace: but the provisions of this statute are so reasonable, and so necessarily applicable to all wars, that as they must be re-enacted fundamentally upon any future commencement of hostilities, they may be regarded as constituting the law of convoy in a period of war; and under this view they fall within the present division of our subject.

II. With a difference only in the name and date of the act, according to any future occasion, the following principles and cases will for the most part apply to any subsequent act of convoy.

Of the provisions of the
late convoy act
of the 43 Geo.
3. c. 57.

III. By the 43 Geo. 3. c. 57., the last convoy act as above said, it was enacted, "That it shall not be lawful for any ship belonging to his Majesty's subjects, (except as therein after provided,) to depart from any port or place whatever, unless under such convoy as may be appointed for that purpose. And the master is required to use his utmost endeavours to continue with the convoy during the whole voyage, or such part thereof as the convoy shall be directed to accompany the ship, and not to separate therefrom

ship.—*Thirdly*, All insurances, whether on the ship, cargo, or freight, are avoided, on the event of a *voluntary* breach of these laws. *Fourthly*, Officers of the customs are required to detain any ship, which ought to sail with convoy, until the master shall have given a bond, with one surety, to comply with the act.

Exception from the convoy act.

VI. But the regulations of the act do not extend, *First*, To any ship that is not required to be registered. *Secondly*, Nor to any ship having licence to depart without convoy. *Thirdly*, Nor to any ship proceeding with due diligence to join convoy from the port of her clearance, in case of the convoy being appointed to sail from any other place; the master, however, giving the bond beforementioned. *Fourthly*, Nor to any ship bound from any place in the United Kingdoms to any place within the same. *Fifthly*, Nor to any ship belonging to the East India or Hudson's Bay Companies. *Sixthly*, Nor to any ship departing without convoy from any foreign port or place, in case there should not be any convoy appointed for such ship; nor any person at such foreign port authorised to appoint a convoy. Nor, *Lastly*, To any ship employed in the Newfoundland fishery. (a)

The sailing with convoy must be a sailing with convoy appointed for the voyage.

VII. The sailing with convoy required by this act is a sailing with convoy for the voyage; and it is not sufficient to sail with a convoy appointed for another voyage, though it may be bound upon the same course for great part of the way; and a ship cannot legally sail from port to port without convoy, unless she is bound from port to port; and if a convoy has sailed, a ship cannot legally endeavour to overtake it. (b) But the statute 43 Geo. 3. c. 57., does not avoid policies on ships sailing without convoy, unless the party interested in the insurance was privy to or instrumental in the sailing without convoy. (c) From the two last cases it appears, that the master of the trading vessels should not omit to obtain the sailing instructions and orders delivered out by the commander of the convoy. In *Anderson v. Pitcher*, Lord Eldon observes, "The value of a convoy appointed by government arises from its taking the ships under controul, as well as under protection. But that controul does not commence until sailing instructions have been obtained; nor can it be enforced otherwise than by their means. Without sailing instructions, the ship does not stand in that relation, or under those circumstances, in

The master of a vessel is bound to obtain the sailing instructions delivered out by the commander of the convoy.

(a) Vide 43 Geo. 3. c. 57.

(b) *Cohen v. Hinckley*, 1 Taunt. 249.

(c) *Henderson v. Hinde*, 1 Taunt.

250, n. *Wilson v. Foderingham*, 1 M. and S. 468.—See likewise *Webb v. Thompson*, 1 Bos. & Pull. 5. *Anderson v. Pitcher*, 2 Bos. & Pull. 164.

The ship must not only sail with convoy, but *bona fide* keep with it.

Where ships are conditionally licensed to sail without convoy, they must strictly adhere to the terms of the condition.

Ingham v. Agnew.]

upon the master, he must not only sail with the convoy, but keep with it; though, upon the principle of necessity above stated, he is excused if separated by tempest, or other inevitable cause and accident. (a) It has been before said, that the master should provide himself with the sailing instructions of the commander of the convoy: but the impossibility of doing so, whether arising from the tempestuousness of the weather, or the refusal of the commander of the convoy, is upon the abovementioned principle a sufficient excuse under the warranty in a policy of insurance. (b)

XI. In the ship *Providence*, *Hinckley v. Walton*, (c) the question before the court was, whether the vessel had complied with the conditions of her licence, and by such compliance had entitled herself to sail without convoy. The licence was granted to sail without convoy, provided she should be manned and armed as stated in the representation, upon which the licence was granted. The ship sailed with the number of men and guns stated in the representation, but had put some on shore in the course of her voyage: and had, therefore, less than the complement stipulated when captured. Under these circumstances the court decided, that the condition of the licence had not been complied with; and that the vessel had, therefore, sailed without convoy, contrary to the act. The two following cases, *Ingham v. Agnew*, and *D'Aguilar v. Tobin*, comprehend so large a portion of the general law of convoy, that we shall give them in some detail.

In *Ingham v. Agnew*, (d) the circumstances were as follow:—The plaintiffs having hired the ship *Ocean*, by charter-party, for a voyage to Messina, Palermo, or Malta, loaded a cargo of goods, in which they were duly interested, on board her at Hull for Palermo, procured the policy in question to be effected, and obtained a licence from the Admiralty, dated the 29th of June, 1810, authorizing the ship, (which was therein described as bound on a voyage to *Gibraltar*, without mentioning any other port,) to sail from Hull to Gibraltar without convoy. The sailing instructions to the master for his voyage were given in the following letter: “Hull, 14th July, 1810. Captain Thomas Aubane, on receipt of this you will immediately proceed with the *Ocean* under your

(a) *Lilly v. Ewer*, Doug. 72.—*Jeffrey v. Legendra*, Carth. 216. 3 Lev. 320.

(b) *Victorin v. Cleve*, 2 Stra. 1250.

Veeton v. Wilmot, Chief Just. Lee, at Guildhall.

(c) 3 Taunt. 131.

(d) 15 East. 517.

It is no deviation, when a vessel sails, *bona fide*, in quest of convoy, in order to protect herself from capture.

stream. She called off the Havanaah, which is on the north side of the island: but neither dropped anchor, nor entered the harbour. The captain staid there less than an hour, and during that time went in his boat within the Mors castle. She then proceeded through the gulf, in her course to England; and was captured by an American privateer, on the 17th. The vessel had no convoy or licence. There had been a convoy on the 30th of June from Jamaica to England: but she was not ready then. There was likewise a convoy at the latter end of July to England. It was objected that the ship was not authorised to go to Havanah; though it might be contended that she went there to seek convoy; and that the clause in the policy as to the return of premium, if the ship sailed with convoy, did not authorize a deviation in quest of it. But Gibbs, L. C. J. said, "Whatever is necessary for the safety of the ship, provided it be not excluded by the terms of the policy, may be done by the captain; and what is so done is done as agent to the underwriters. A vessel, when insured, may always do whatever it would be expedient to do if uninsured. She may deviate somewhat from the straight line of her track to seek convoy, when it is for the common good and preservation. It may be as justifiable to seek convoy as to avoid an enemy. Therefore, not only does the reduction of the premium, in case she sails with convoy, authorize her to seek it; but she is at liberty to do so for her own security." The defendant's counsel then relied on the first and eighth sections of the convoy act, and contended that the vessel should have waited for convoy. In 1814 Admiral Brown was on the Jamaica station, and had actually appointed convoys; one on the 30th of June, another on the 30th of July. They did not, however, produce any order from the Admiralty which authorized Admiral Brown to grant convoy or licences: but they contended, that it was to be inferred that he had this power, from being nominated to the station; and having actually appointed convoys. But the Lord Chief Justice observed, "Ships sailing from foreign ports are exempted from the restrictions of the convoy act, unless there are persons at those ports authorized by the Admiralty to grant convoy or licences. I cannot infer, from the act of the admiral in appointing a convoy, an authority from the Admiralty to grant one. This act is highly penal, and Jamaica might have been excluded. There is no proof that there was any convoy for Cuba at the time. The Legislature saw it would be inequitable to oblige vessels to sail with licences or convoy, when no one in foreign ports was authorized to grant

thorized to grant licences to sail without convoy. (a) So, likewise, in another case, Lord Ellenborough held, that, where the law required a ship to sail with convoy, he would presume that the law was obeyed till the contrary was shewn. "This principle (he added) had been settled in *Williams v. The East India Company*, (b) and a variety of other cases." (c)

(a) *Wake v. Atty*, 4 Taunt. 463.

(b) 3 East. 192.

(c) *Thornton v. Lance*, 4 Campb. 231.

LAW OF NAVIGATION,

Merchant Shipping,

AND

MARITIME CONTRACTS.

PART III.

MARITIME CONTRACTS.

CHAPTER I.

ON CHARTER-PARTIES.

In the progressive improvement of commerce, and the division of labour which necessarily followed upon it, the functions of the merchant were gradually separated from those of the navigator; and it appears that general trade was, accordingly, very early divided into the two main branches under which we at present see it; that of the merchant who exports and imports goods, and of the ship-owner who conveys them for him. Under these circumstances, therefore, the general relation of the ship-owner to the merchant is that of being the carrier of his goods for hire. From the importance of this employment, and the value and magnitude of the cargoes carried, this contract of hiring is always made by a special writing; that is, by deed, or at least by a writing unsealed. This deed, or writing, has from very early times been designated by the name of a charter-party, a popular corruption of the Latin term *charta partita*, the ancient name of this con-

Of the nature
of a charter-
party of af-
freightment.

tract in the early writers on the Law Merchant. (a) It appears to have been so called from the custom, in those times, of first writing the contract upon a large skin of parchment, which was then divided into two parts by being cut in an indented line from top to bottom, of which each of the contracting parties took one: as this indented line necessarily passes through some word, or figure, common to both parts, the exact tallying of the two parts upon relation and comparison was conclusive evidence of their original agreement and correspondence. The subject of the present Chapter is the nature and form of this contract, its stipulations and parties.

+ I. A charter-party is, therefore, a contract for the letting to freight the whole or part of a ship, for one or more voyage or voyages. Such contract is universally in writing: but it is immaterial whether it be by deed, or writing under hand only. (b) The parties to a charter-party may be either the principals themselves, or their agents; that is, may be either the ship-owners and merchant, or the master and broker. If the charter-party be made at the place of the owner's residence, the former mode is the more usual. If the vessel be hired in a foreign port, the charter-party is usually made by the master for the owners. In the latter case, as no one can bind another by deed, unless previously authorised so to do by an instrument of equal authority to himself, the deed of the master, unless accompanied by a previous deed from the owners to such master, cannot bind the owners; or, at least, does not give the freighters a direct action against

(a) Where persons, unconnected, load goods on board a ship, she is called, in popular language, a *general* ship; but when she is expressly let to hire to one or more, or to a company, such ship is called a *chartered* ship.

(b) A memorandum of a charter-party, or, in other words, heads of agreement for the formation of one, are as common between merchants as more formal charter-parties. In the former case, the agreement is not so specific or particular as a charter-party, nor is it under seal. It is, however, equally binding as if a more formal and solemn instrument had been executed; and is frequently the only written contract between the ship-

owner and merchant. It is not material, therefore, whether the instrument purport to be a charter-party, or a memorandum, or agreement, for the hire of a ship. It will, perhaps, be unnecessary to observe, that these contracts, like all others, require no form of words, but vary according to the circumstances of the case and the intention of the parties. The great chartered Companies, and the public Boards, have mostly forms of their own; and merchants are constantly in the habit of varying their charter-parties according to the nature of their trade, and the particular exigencies of each adventure.

v. Hopper, (a) whence it may now be regarded as an established point, that an action on a charter-party must be brought in the name of the parties to such contract. But if the contract be not under seal, it may be brought in the name of all the parties having the legal interest; that is to say, in the name of the owners, although the master's name only be used in the contract. Thus in *Skinner v. Stocks*, (b) the joint owners of a vessel, engaged in the whale fishery, were allowed to sue a purchaser for the price of whale oil, although the contract of sale was made by one of the part-owners, and the purchaser did not know that other persons had any interest in the transaction. "For actions of this kind, said the court, may be maintained, either in the name of the parties with whom the contract is *actually made*, or in the name of the parties *really interested*. If the introduction of *new names* make any difference, in fact, to the defendant, by affecting his right of set off, he may perhaps apply to the court for relief. But the statutes of set off do not prevent the action from being maintained in the name of *all the parties interested*."

A distinction
between a deed
inter partes and
a deed poll.

IV. A distinction, however, must be taken between a deed which is expressed to be made between certain parties on the one side, and certain other parties on the other side, and a deed which is not so expressed, but begins, "To all to whom these presents shall come," which is, in fact, the peculiar form of a deed-poll. In a deed *inter partes*, no grant or covenant can be made with any other person than such as may be party to the deed; but in a deed-poll, a grant, or covenant, may be made to any person, though not parties to the deed. In the deed *inter partes*, though a person not enumerated as one of the parties should be one of the covenantees, or obligees, and in that character should sign, seal, and deliver the deed; yet he is not competent to give a release, nor will his release bar the action of any one who is a party. Therefore, in an action brought by one Scudamore and Others v. Vandenstone, (c) upon a charter-party by indenture, expressed to be made between the plaintiff and others, owners of a certain ship, whereof one Robert Pitman was master, on the one part, and the defendant on the other part, whereby the plaintiff covenanted with the defendant and Pitman, and the defendant covenanted with the plaintiff and Pitman, binding himself to them in a penalty for the performance of the covenants, and concluding, "In witness whereof the parties to these presents have put their seals, &c."

(a) 2 New Rep. 411.

(b) 4 Barn. and Ald. 437.

(c) 2 Inst. 673. 2 Roll. Abr. 22

F. 1. S. P.

Pitman having executed the indenture, the defendant pleaded in bar a release by him : but on demurrer the above distinction was taken and agreed upon ; and it was adjudged that this release of Pitman did not bar the plaintiff, because Pitman was no party to the indentures. But if the indenture express that the master of the ship lets it to the merchant, with the consent of the owner, and then goes on to state that the merchant has entered into certain covenants, therein expressed with the owner ; in this case the owner may bring the action on the covenants ; though, unless such owner have sealed the deed, he cannot be himself sued upon it ; the distinction being, that he is a party to the covenants of the deed, though not to the obligation ; others have bound themselves by deed to him, and may be sued as bound by deed, but he has not so bound himself, nor can he be so sued by them. (a)

Of the usual form of a charter-party.

V. A charter-party, in its most usual form, begins by specifying the parties between whom it is made, their character as master or owner of the ship, and the name, burthen, or tonnage, (register measurement) of the vessel, and its situation at the time it is chartered. It then proceeds to let the vessel, or part of it, to the merchant, for the voyage or voyages, or for a certain period of time, and to specify the freight either in a gross sum for the whole voyage, or a particular sum for every month or week of the ship's employment, or at so much per ton, cask, or bale of goods. The deed then stipulates, on the part of the owner or master, that the ship shall be sea-worthy, and in a condition to carry the goods ; and shall be provided with all necessaries for the intended voyage, both on departure and in the course of it : that the vessel shall be ready by an appointed day to receive the cargo, and shall wait a certain number of days to take it in ; that after having received her lading she shall sail upon the destined voyage with the first fair wind, and shall deliver the goods (certain perils and accidents excepted) at the destined port, to the freighter or his assigns, in as good condition as they were received on board, the freighter or his assigns paying freight. On the part of the freighter he contracts to furnish a cargo, and to load and unload the goods within a reasonable time. The times stipulated for that purpose, commonly called lay or running days, are explicitly expressed ; as well as the times appointed for the payment of the freight, and the manner of such payment, and the rate of demurrage *per diem*, in case of the vessel's detention beyond her lay or running days. The deed

(a) *Cooker v. Childs*, 2 Lev. 74. ; and *Gilby v. Copley*, 3 Lev. 138. ; and *Laws on Charter-parties*, 11.

then generally concludes with a penal clause, binding the master or owner, and the ship's tackle and furniture, and sometimes the freight, and the merchant and his goods, in a certain sum, to the performance of the several covenants in the charter-party.

VI. But although these are the usual stipulations in a charter-party, there is nothing to preclude the owner on the one side, or the merchant on the other, from adding other special conditions, which, as before observed, are usual in ships taken up by commissioners for the public service, or by the directors of trading companies. In all such cases the master or owner is necessarily bound by his special stipulations. (a)

Legal effect
of the cause
of lien in a
charter-party.

VII. The first effect of the charter-party is, that as it binds the ship to the freighter, so it likewise binds the cargo to the ship, and gives the owners a lien on it for their hire in the first instance. This lien of the ship-owner on the cargo of which we shall have occasion to speak more at large in the Chapter upon Freight, is founded on the same principle as the lien in the ordinary case of carriers; and would subsist by construction of law, although not expressed in terms, as is sometimes the case in the charter-party. But the courts entertain great jealousy of the extent to which the power of holding in lien may be pushed; and upon this principle will not allow it to be exercised in any case, where the amount of the claim is not either fixed in itself, or may not be unquestionably ascertained by computation. Thus a lien cannot be sustained for any breach of covenant, of which the damages are unsettled, and which, therefore, can only be duly rated either by a jury or by an arbitrator. And in *Phillips v. Rodie*, (b) the Court of King's Bench would not admit a lien for demurrage, the charter-party not containing a clause to that effect.

The indorsee,
or assignee, of
a bill of lading,
is bound by its
terms; and the
master may
retain the
cargo, by way
of lien, or sue
them for freight
if they accept
the consign-
ment.

VIII. The law of England, indeed, in all cases regards the lien as an equitable right in the circumstances in which it allows it to be exercised: but as it is necessarily in itself a power of vindicating his own cause in the party exercising it, the courts strictly confine it to cases of a fixed and ascertained amount of damage. The case in which lien is chiefly exercised is, to enforce the payment of freight, where the merchant, who originally freighted the vessel, or the consignee, has become insolvent, and the assignees dispute the amount or conditions; or where the cargo has been transferred by the effect of law, or some subsequent contract, and the obligation of paying the freight has been transferred with it. But even in these cases the amount for which the ship-owner may hold in

(a) See *Beatson v. Shank*, 8 East. 233.

(b) 1 Abbot, 191. and *Birley v. Gladstone*, 3 M. and S. 205.

The effect of a charter-party commences from its delivery, and not from its date.

Of the commencement of the operation of the charter-party.

X. A charter-party being a deed, the effect of it commences from the delivery, and not from the date; and, therefore, in *Oskey v. Hicks*, (a) where the deed was dated the 9th of the month, but was not delivered till the 28th; it was decided that an accidental occurrence between the 9th and the 28th did not affect the obligations of the parties; though, if the same had happened on or after the 28th, it would have been within the matter of their stipulation. The time, indeed, at which the effect of all deeds com-

damificatus. And, in an action of covenant at common law, a breach must be assigned, and the extent of the injury will be the measure of damages which the plaintiff will recover. But if it be worded to pay 5*l.* an acre for every acre ploughed up, there is no alternative; no room for any relief against it; no compensation; it is the substance of the agreement.

Sixthly, When the precise sum, therefore, is not of the essence of the agreement, the *quantum* of damages may be assessed by a jury: but where the precise sum has been fixed and agreed upon by the parties, that very sum is the ascertained and liquidated damage; the jury are confined to it, and the plaintiff cannot recover beyond it. For example, where a stipulated sum has been claimed for breach of a marriage contract; in which case it might not be possible to ascertain precisely what damages the person, in respect to whom the contract is broken, has sustained; and, therefore, the contracting parties agree to pay a stipulated sum; in such case, the sum stipulated is, by the convention of the parties, the *real* debt, and becomes due, *in integro*, on a breach of the contract.

Seventhly, But in all articles guarded by *penalties*, there are two remedies to be pursued at the option of the party injured; he may, as often as the articles are broken, have, *toties quoties*, an equitable relief upon the footing of the articles themselves for a partial breach of contract, or he

may take the penalty. That is to say, where there is a penalty, and distinct covenants in the same deed, the party has his election, either to bring debt for the penalty, or an action in covenant for damages; in the former case the contract is rescinded, and the penalty becomes the debt in law; subject, of course, to such relief in equity, as the circumstances of the case may require, and to the restrictive provisions of the 8 and 9 William 3. in a court of law. And if the penalty be paid, according to the stipulation of the articles, or be recovered as the debt in law, the party cannot resort back to his covenant, or action for the breach of the contract. But he may elect, in the first instance, to bring his action on the contract, (disregarding the penalty altogether as the fund for his indemnity;) and according to the nature, the extent, and *repetition* of the *breaches*, may recover even *beyond* the amount of the penalty in damages. *Ponsonby v. Adams*, 6 Br. Parl. Cas. 418. *Rolfe v. Peterson*, 6 B. R. P. Cas. 470. *Homan v. Walter*, 1 Br. Cas. Chan. 418. *Hardy v. Martin*, *ibid.* 419. *Low v. Peers*, 4 Burr. 2229. *Cotterel v. Hook*, Dougl. 101. *Bird v. Randall*, 1 Black. 367, and 378. *Winter v. Trimmer*, *ibid.* 395. *Fletcher v. Dyche*, 3 T. R. 32. *Astley v. Weldon*, 2 B. and P. 346. *Smith v. Dickenson*, 3 B. and P. 630. *Harrison v. Wright*, 13 East. 343. *Wilbeam v. Ashton*, 1 Campb. 78. *Barton v. Glover*, Holt's N. P. 43.

(a) Cro. James 263.

menes, is, when they are concluded; and a deed can only be said to be concluded when it is delivered. The delivery, therefore, may be averred to be after the date; (a) and if it be impossible to give the charter-party effect by regarding the day it bears date as the day of its execution, the party may aver that the instrument was made and concluded at a subsequent day. Thus, in *Hall v. Cazenove*, (b) where the charter-party was dated the 6th of February, but was not executed till the 15th of March, and which contained a covenant, on the part of the owner, that the ship should sail by the 12th of February; and a corresponding agreement upon the part of the freighter that, in consideration of the matters above-mentioned, he would pay a certain freight; it was decided by the Court of King's Bench, that upon an averment of the voyage being performed, the owner might recover. The Court, indeed, professed to give their judgment upon three reasons:—the first, that the covenant for the ship's sailing on or before the 12th of February was no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damages; the second, that it was not of the substance of the contract, which was for performing the voyage for which the ship was chartered, and earning the freight; and, thirdly, that the voyage was rendered impossible to be performed, by the parties themselves not having executed the deed till after the time appointed for doing the act, and thereby dispensing with the performance of it. But the legal reason of the decision appears to have been principally the one above-mentioned; that the deed was not to be deemed concluded until the day of its delivery.

Of the commencement of the operation of the charter-party.

XI. The most important cases with reference to charter-parties have arisen under the head of demurrage, the proper interpretation of which is the compensation due to the ship-owners from the freighter, by reason of any delay or detention of the ship beyond the time expressed or implied in the contract. Demurrage, indeed, is nothing more than a kind of extended freight. But in order to meet the ordinary circumstances of some unforeseen delay in loading or unloading, it is usually specified in charter-parties, that a certain number of days, called running days, shall be allowed for receiving, or discharging, the cargo; and that the freighter may detain the vessel for a further specified time, upon the payment of so much *per diem* for such over time. In many charter-parties the contract is, that the vessel shall be loaded and discharged in the *usual* time, or within a *reasonable* time after her arrival in port. In others, this condition is altogether omitted. In all these cases the courts of law will give a liberal construction to the char-

Demurrage, what it is; and where it is due.

(a) *Sone v. Ball*, 3 Lev. 348.

(b) 4 East. 477.

ter-party; and will endeavour, as much as is possible, to understand the actual intentions of the contracting parties, and to give a corresponding effect to their deed. \

XII. Where the charter-party expressly stipulates that so many days shall be allowed for the discharge of the cargo, and so many further days, at so much *per diem*, for any overtime, the courts will interpret, that such a limitation is an express stipulation on the part of the owner that his vessel shall *in no event* be detained longer; and that, if longer detained, it shall be the delay of the freighter, and for which, as such, he shall make due compensation to the owner. Under these circumstances the freighter will be liable for demurrage, even where the delay is not incurred by any fault, but is inevitable, this being one of the cases where legal liability is not necessarily combined with fault or intention. *Randall v. Lynch* (a) is a leading case under this principle; having been first decided at Nisi Prius, and afterwards confirmed by the Court of King's Bench. But the principle of this decision being remote from popular reasoning, it deserves an attentive consideration. It was an action on a charter-party for a voyage to Lanceretto, and back to London, in which it was covenanted that the vessel, after taking in her lading, should proceed direct to the port of London, and upon arrival at the London docks, and after regular report at the custom-house, should discharge the said cargo, and there end and complete the voyage; that forty days should be allowed for unloading, loading, and again unloading the cargo, and that the freighter might further detain the vessel, at his option, for ten working days, upon paying five pounds per day demurrage. The breach alleged was, that the freighter had detained the vessel in the London docks for thirty-five days beyond the ten days last mentioned. The defence was in a narrative of the circumstances of the case. It appeared that the ship arrived from Lanceretto, in the London docks, on the 10th of August of the year the action was brought, and was reported next day to the custom-house. The forty days stipulated in the charter-party for unloading the outward cargo, and loading and unloading the homeward cargo, expired on the 22d of August; but, on account of the crowded state of the docks, her discharge could not then be begun; and it was not finally completed till the 6th of October, being about thirty-one days after the expiration of the ten days during which time she might be kept on demurrage of 5*l.* per day. Under these circumstances it was contended by the counsel for the defendant, that this delay was not in any degree to be imputed to him, but to circumstances over which he had no control; and,

In a charter-party, containing an express number of days for demurrage, the freighter is liable for all delay, even though not in fault, and though the delay be inevitable.

Demurrage in the case of a chartered ship.

Randall v. Lynch.

(a) 2 Campb. 356. and 12 East. 179.

therefore, that he could not be liable where there was neither wilfulness nor negligence. But Lord Ellenborough held, that the detention of the ship, arising from the inability of the London dock company to discharge her, was, in point of law, imputable to the freighter; that the person who hires a vessel must be considered as detaining her, if at the end of the stipulated time he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so. While the goods remained on board the vessel in the London docks, it was impossible for the plaintiff to make any use of her; and to all intents and purposes she was there detained by the defendant. When she was brought into the docks all had been done which depended upon the plaintiff, and the dock company were the defendant's agents for her delivery. The defendant was as much responsible for a delay arising from the want of a birth, as if it had arisen from tempestuous weather or any other cause.

Demurrage.

XIII. *Randall v. Lynch* was a decision under a charter-party: but the same principle was laid down in the case of *Leer v. Yates*. (a) In that case a *general* ship took brandies on board, under bills of lading which allowed twenty lay days for the delivery of the goods in London, and stipulated for 4*l.* per day demurrage afterwards. Certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the London docks until forty-six days after the twenty days; and some of the goods, which were undermost, could not, though demanded, be taken out, till the upper tiers were cleared. The Court of Common Pleas, notwithstanding, decided, that each of those consignees was liable, on a general count for demurrage, to pay the 4*l.* per day for the forty-six days.—Mansfield, C. J., in delivering the judgment of the court, says, "I was struck with the argument that it was not the fault of the defendant, but the fault of the plaintiff himself, that these goods could not be got out till other goods, which lay above them, were delivered. But it is not, in truth, the fault either of the plaintiff or defendant, that the goods could not be taken out. There can only be so many goods on the top of the vessel, as the proper stowage of the goods will allow; therefore, all the others must be at the bottom; and, as this is a general ship, and the goods do not all belong to the same consignee, the goods of some of the consignees must be undermost. If this argument would avail, therefore, that the captain is not entitled to demurrage for the goods which were not uppermost, it would restrain the contract for demurrage to the few persons whose goods were at top: but that

Demurrage in the case of a general ship.

Leer v. Yates.

(a) 3 Taunt. 387.

construction would be contrary to the positive contract; for it is impossible to get out of the words of this bill of lading, which, though it be a singular species of contract, to bind a consignee by an instrument, signed not by himself, but by the captain; yet, as the consignor delivered the goods on board under that bill, and the defendants accepted that bill of lading, it is binding upon them; and, therefore, this action may be sustained on the general count for demurrage."

Whoever accepts goods, as a consignee, or indorsee, of a bill of lading, is liable to pay demurrage if it be due.

Harman v. Gandolphi.

XIV. And in a subsequent case, Gibbs, C. J., determined, that any person taking goods under a bill of lading made himself liable to all its terms; and was therefore bound to pay demurrage, if that were expressly stipulated. The principle, indeed, is one of the most manifest equity, that if the consignee accept the fruits of the contract, with a full knowledge of the terms, he is bound by it, and cannot send the captain back to the consignor for demurrage. (a) Therefore, in Harman v. Gandolphi and Others, (b) where a general ship took some silk on board to carry from Rotterdam to London, on defendants' account; and upon the margin of the bill of lading, (which he accepted) was written, "the consignee to clear the goods in fourteen running days after her arrival in port, or to pay 4*l.* *per diem* for demurrage;" the defendant applied for, and was ready to receive his goods within the running days: but, being undermost in the vessel, the delivery thereof could not be made till some days afterwards.—Gibbs, C. J., held, upon the authority of the preceding cases, that the plaintiff was entitled to recover demurrage, though he did not deliver the goods demanded within the time allowed. "The consignee," he said, "by taking to the goods, contracts with the owners of the vessel to perform the terms upon which they have undertaken to convey and deliver them. Those terms are expressed in the bill of lading; and the defendants, by claiming and receiving the silks, under the bill of lading, have acceded to those terms. Each consignee undertakes to clear away his goods within a certain time; and although, by the default of others, he is prevented from so doing, he is liable to pay demurrage by the terms of the contract, unless the delay be occasioned by the default of the captain or his crew."

Several cases depended upon this decision, and a bill of exceptions was tendered upon the ruling of the Chief Justice: but it was afterwards abandoned.

XV. The decision in Leer v. Yates, and the cases which have followed upon it, seems to stand upon legal, and, properly understood, upon equitable principles. The hardship is incidental; and

(a) *Jesson v. Solly*, 4 Taunt. 52.

(b) *Holt's N. P.* 35.

capable of delivery at the time. This, at least, is a concurrent, if not a condition precedent.

Of the principle of the decision in *Leer v. Yates*.

The answer to this argument, which is undoubtedly very specious, and had for a long time considerable effect upon the commercial world, appears to be in substance; first, that between the owner of the vessel and the consignee of the goods there is no necessity for an express contract. Though there be no original privity of contract between the parties, yet the taking of the goods from the ship, under the bill of lading, is evidence of an agreement, *in ipso tempore*, to pay the freight, &c. according to the terms of the bill of lading. That the bill of lading, indeed, is not signed by the consignee, but is delivered to the shipper abroad, and by him *presumed* to be transmitted in due mercantile course to the consignee at home. By taking to the goods, such consignee accedes to the terms of the bills of lading under which he takes them, and concludes the contract by executing it. *Dobbin v. Thornton*, 6 Esp. 16. *Cock v. Taylor*, 13 East. 399. and *Wilson v. Kymer*, 1 M. and S. 157. Secondly, in ordinary cases where demurrage is claimed, the question is two-fold. Did the delay arise from the default of the freighter, or consignee? Was it the act, or *delictum*, of the owner himself, his captain, or his crew? But there is a middle case, that in which neither is in default; and in which the question is, *which party is bound by the incidents of chance, or of any cause not within his own control*. In this case (which is the one under examination) as the loss must be sustained by one party, the enquiry is, who is to bear it? And here we must have recourse to general principles. A person who hires any chattel, whether it be a horse, a carriage, or a ship, may be said to detain it, if at the end of the stipulated time he does not return it to the owner. He is responsible for all incidental circumstances which may prevent him from so doing. In the present case it is totally an indifferent circumstance that the ship is a general ship; all and every one, each singly for himself, is bound to clear within the stipulated time. If any one do not clear his goods, no matter from what cause (the ship being there with them,) he detains the vessel, and renders it impracticable for the owner to make use of her for other purposes. Any one, therefore, in this default, is liable for the detention of the vessel. Thus in *Randall v. Lynch*, 2 Campb. 352. it was determined by Lord Ellenborough, that if, by reason of the crowded state of the London docks, a ship is detained there before she can be unloaded a longer time than is allowed for that purpose by the charter-party, the freighter is liable for this detention to the owner of the ship.

The master is bound to obtain the ship's clearances.

Demurrage due in a case of detention for a cargo, under a prohibition by a foreign government to export the intended article.

The master is not bound to give notice to the consignee of the ship's arrival.

employed in unloading her at Helsingland; and contended, that as she was necessarily detained during all that time, the defendant was answerable, although the detention arose from circumstances over which he had no control. Gibbs, C. J., concurred in this reasoning, and held that the frost was no defence. There was an absolute undertaking, by the freighter of this ship, to load and discharge her in thirty days; and whether it was possible or impossible for him to do so from the state of the weather was totally immaterial. He had made a contract against all events, and he must abide by it. But the defendant was of course not liable for the detention of the ship at London after the 25th of February, when her loading was completed, it having been the duty of the plaintiff to obtain her clearances; and as this had become impossible, from the custom-house having been burnt down, the detention in the interval was considered as belonging to the plaintiff and not to the defendant. In *Thompson v. Wagner*, (a) Lord Kenyon had before ruled that frost, completely blocking up the vessel, was no exemption from the claim for demurrage; and gave leave to move the court upon the point: but no motion was afterwards made, the principle being considered as established.

XVII. In *Blight v. Page*, (b) a case referred to by Gibbs, C. J., in *Barrett v. Dutton*, this principle was carried still further; it being decided in that case, that if a merchant hire a ship to go to a foreign port, and covenant to furnish a lading there, a prohibition by the government of that country to export the intended articles neither dissolved the contract, nor excused a non-performance of it.

XVIII. In the same manner, in *Harman v. Clarke*, (c) where it was stipulated that the goods should be taken out fourteen days after arrival, or to pay eighty shillings a day demurrage, the defendant was held to be liable to the demurrage, though he pleaded that he had only failed in discharging the goods in due time from ignorance of the ship's arrival, no notice having been given. But the court held that no notice was necessary, the bill of lading itself (the ship being a general ship) containing an indorsement that the goods should be discharged within the time specified.

XIX. In *Hill and Others v. Idle and Others*, (d) it was likewise held, that the hirer was answerable for a delay arising from

(a) *Sittings after Trinity Term*, 1801. MS.

(b) 3 B. and P. 295. In this case it was observed by the court, that demurrage would not be due if the captain knew of the prohibition before

he entered the port whence he was to fetch his cargo, though demurrage was allowed by the contract.

(c) 4 Campb. 159.

(d) 4 Campb. 327.

any internal regulation or custom-house restraint in the port of lading or delivery. The circumstances of this case were peculiar.

It was an action by the ship-owner against the consignees, for not unloading a vessel from Oporto to London, within reasonable time.

The goods consisted of sixty hogsheads, and eighteen cases of French wines. The ship arrived in the port of London on the 3d day of July, when it was found that the wines, from having been unshipped at Oporto, could not be landed without an order from the Treasury. A petition for this purpose was instantly presented, and the defendants used the greatest exertions to have it expedited: but the order could not be obtained till the 4th of August, when the wines were actually landed. All the other goods had been discharged on the 8th of July. It was contended for the defendants, that they were not answerable for the delay which had thus arisen. Until permission was given by the Lords of the Treasury, the plaintiffs were as incapable of delivering the goods as the defendants of receiving them. But Lord Ellenborough said, that if a freighter ship goods which require a special order for their landing, he must relieve the ship-owner from the difficulty he occasions; and after a reasonable time for the discharge of goods requiring such order, the delay is the freighter's till the order is obtained.

Demurrage due in the case of detention by port regulations or custom-house restraints.

XX. Upon the same principles, it is no defence to an action for demurrage, that the delay in unloading the ship arose from the act of custom-house officers, in unlawfully seizing a part of the cargo. In *Bessey v. Evans* (a) the ship was let by the plaintiff to the defendant for a voyage from Heligoland to London, under an agreement that the defendant should be allowed thirty days for loading and unloading the cargo, and should pay three guineas a day demurrage for every day beyond that time. The whole of the cargo was unladen in the port of London, within the running days, except four barrels of pitch, which the officers of the customs would not permit to be landed till seventeen days after. There was nothing illegal in the importation of the pitch, and the interference of the custom-house officers was altogether unauthorized. Under these circumstances, it was contended for the defendant, that he could not be liable for the wrongful act of the custom-house officers in detaining the ship. But Lord Ellenborough said, that the defendant was manifestly liable for demurrage; the illegal detention of the ship by the custom-house officers being a casualty of the voyage, and the casualty of the voyage necessarily belonging to

Demurrage due, though occasioned by the unlawful act of custom-house officers seizing goods.

(a) 4 Campb. 131.

the hirer. He had his remedy against the custom-house officers: but the ship-owner must seek his satisfaction from him.

Freighters, under bills of lading, are subject to the same demurrage as freighters under charter-parties.

XXI. As respects demurrage, the freighter, by virtue of a bill of lading, is liable upon the same principles with the merchant under the charter-party; there being no effectual difference between a charter-party and a bill of lading, except that a charter-party is mostly a deed hiring the whole ship, whereas a bill of lading is an acknowledgment by the ship owner or master of the lading of particular parcels on board. We shall treat more fully of bills of lading in the sequel; but they are always given to the freighter under charter-parties, in the same manner as when goods are conveyed by a general ship. It is sufficient, therefore, to observe, as respects the present point, that with regard to any demurrage, the freighter under both is subject to the same liabilities. And, therefore, in *Harman v. Mant*, (a) where the bill of lading was indorsed with a notice to the consignees that the goods were to be taken out within fourteen days after her arrival, but the consignees pleaded in defence, that they had no other notice of this limitation but the indorsement on the bill of lading, it was decided by the court, that such notice was sufficient, and that it was unnecessary for the captain or ship-broker to send any particular notice of the arrival of the vessel.

XXII. The courts of law, indeed, in all cases, have a due consideration of the value of the ship, and of the loss and expense to the owners by her detention; and, under this principle, they favour demurrage as an equitable claim. Ship-owners are the public carriers by sea; and having upon their part all the onerous liabilities, the law gives them, as respects the merchant-freighter, all the equitable rights. The analogy between the ship-owner and the carrier is indeed so close, that many of the most important cases daily arising between freighters and owners would receive a familiar illustration, and would be brought nearer to popular apprehension, by being compared with parallel circumstances in cases between carriers and their employers, or between the hirers and letters of vehicles and modes of conveyance. The principle of liability exactly corresponds in both relations. Thus we have seen that the hirer of a vessel is always regarded as the person who detains it. Thus the casualty of the voyage, as to delay, is, in most cases, the casualty of the merchant freighter under charter-parties. Thus he who hires for a time limited, or expressed, is liable, without any fault or negligence, for any delay beyond the time specified.

(a) 4 Campb. 161. See *Leer v. Yates*, 3 Taunt. 387. and *Harman v. Gandolphi*, *ante*.

If we were to proceed in a comparison of the rules and principles under each of these relations, through the whole capacity of each, the same correspondence would appear, so much so, indeed, as to render the law of bailment and the law of charter-parties very nearly the same.

Demurrage.

XXIII. The greater portion of charter-parties contain, as above said, an allowance of so many specified days for loading and unloading; and so many further days, for which the freighter, if he detain the vessel, shall pay at the rate of so much per day demurrage. Under this express stipulation the law is as has been above stated. But in other charter-parties the condition is, that the ship shall be unloaded and discharged within the usual and customary time of ships in the port of delivery and discharge;—or, simply, within the usual and customary time. Under a charter-party containing these terms, it has been decided that the freighter is not liable for any delay which may arise from the ordinary course of business in the port or custom-house of the place of discharge. Accordingly, if a freighter, by a charter-party so expressed, shall have the vessel detained in waiting for her turn of discharge, either from the crowded state of the port, or from the routine of business in the bonded warehouses, such delay is held to be within the usual and customary course of such ports, and he is not responsible for it to the owners as demurrage. Since the construction of docks for different branches of trade, and the institution of bonded warehouses, such delays are frequent and unavoidable; and as the courts presume such course of business to be well known both to the merchant and to the ship-owner, they give a corresponding interpretation to the terms of the charter-party, where, by the omission of a time expressly limited, they will admit of such construction.

What will be demurrage under a stipulation in the charter-party, that the vessel shall unload in the usual and customary time.

XXIV. A charter-party, expressed in these terms, came before the consideration of the court in *Rogers v. Forrester*, (a) which was an action on a charter-party, in which it was covenanted between plaintiff and defendant, that the defendant, being the freighter, should unload the ship within the usual and accustomed time. The alleged breach of this covenant was, that although the usual and customary time to unload the said ship in the port of London amounted to seven days next following her arrival, the freighter detained the ship forty-nine days over and above such usual time. It appeared from the circumstances of the case, that the *Margaret* actually entered the London Docks with her homeward cargo on the 25th of August, and was reported the following day. On the

Rogers v. Forrester.

Demurrage.

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Forrester.

31st of the same month the wines were bonded by the defendant; and he was ready to have received them, if they could have been unloaded. But, on account of the crowded state of the London Docks at this time, the ship could not get a birth till the 20th of October, and was not fully discharged till the 26th of that month. If the duties had been immediately paid upon the wines, they might have been landed in a much shorter time: but the superintendent of the London Docks said, he had never, since the bonding system was introduced, known a cargo of wines, brought by a ship so large as the *Margaret*, landed and delivered;—such cargoes had always been bonded. It was contended, on the authority of *Randall v. Lynch*, that the freighter was liable for the detention of the ship in the Docks beyond the time when she might have been discharged, had the duties been immediately paid. But Lord Ellenborough said, that in that case a specific period of forty days had been fixed by the charter-party for loading and unloading the cargo. But that the stipulation in the present case was, that the freighter should be allowed *the usual and customary time* to unload the ship in her port of discharge. The question, therefore, was, what was the usual and customary time for a ship to unload a cargo of wines in the port of London? The answer seemed to be; when the ship gets a birth by rotation, and the wines can be discharged into the bonded warehouses. The wines might have been landed sooner by an immediate payment of the duties: but since the bonding system was introduced, this had ceased to be the usual and customary mode of unloading such a cargo. Lord Ellenborough was therefore of opinion, that the defendant had not broken the implied covenant, arising from the terms of the charter-party, to unload the ship in the usual and customary time for that purpose at her port of discharge, and that he was not, therefore, liable for any delay.

Demurrage
where no time
is mentioned
in the charter-
party.

XXV. If the charter-party contain no stipulated time within which the cargo shall be unloaded; if it neither specify a particular number of days, nor employ any general terms, such as "within the usual and customary time of unloading at the port of discharge," or "within a reasonable time," or words of the like import, in this case, the implied contract on the part of the charterer is, to discharge the ship in the usual and customary time for unloading such a cargo. A charter-party of this kind, or rather a bill of lading, was so interpreted by Lord Chief Justice Mansfield, in *Burmester v. Hodgson*. (a) The defendant was consignee of a cargo of

brandy, brought from Charente to London, by the ship *Athana*, or *Demurrage*, which the plaintiff was master. In the bill of lading, there was no stipulation whatever for demurrage, or for unloading the brandy in any particular time. The ship entered the London Docks on the 19th of August, 1809: but as the docks were extremely crowded, and the brandies were to be bonded, she was not able to begin to unload till the 11th of October, and did not discharge the whole of her cargo till the 19th of the same month, making a period of sixty-three days from the time she entered. It appeared to be the invariable practice to bond cargoes of this sort. Even when the cargo is bonded, if the docks are not over crowded, twenty or twenty-three days are a sufficient space of time for unloading. The plaintiff, therefore, insisted that he was entitled to a compensation in the nature of demurrage, from the time the ship might have been unloaded, till she was completely discharged. Mansfield, C. J., was of opinion that this could not be distinguished from *Rogers v. Forrester*. Here the law could only raise an implied promise to do what was there stipulated for by an express covenant, namely, to discharge the ship in the *usual and customary time* for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded, in her turn, into the bonded warehouses. Such time has not been exceeded by the defendant. If the brandies were to be bonded, they could not be unloaded sooner, and the defendant seems to have been as anxious to receive as the plaintiff was to deliver them. (a)

Demurrage
not due for
delay by sea
and winds.

XXVI. There are two main circumstances, however, in which demurrage can never be claimed against the freighter; the first, in the case of the hostile detention of the ship, or, what is equivalent to it, the hostile occupation of the intended port; and, secondly, in the case of accidents by winds and sea. (b) The general rule, indeed, here strictly applies, that the accidents of the sea belong to the ship, and the delays of the port to the freighter. Upon the same principles, the payment of demurrage, stipulated to be made while a ship is waiting for convoy, ceases as soon as the convoy is ready to depart; and such payment, agreed to be made while a ship is waiting to receive a cargo, ceases when the vessel is fully laden, and the necessary clearances are obtained, although the ship may, in either case, happen to be further de-

(a) Evidence of usage is admissible, to shew that where a vessel is to be discharged within fourteen days, or to pay five guineas a day demurrage, *working days*, and not *running days*,

are to be understood. *Cochran v. Rethhergh*, 3 Esp. 121. per Lord Eldon.

(b) *Liddiard v. Lopes*, 10 East. 526.

tained by adverse winds or tempestuous weather. And if, after having once set sail on her voyage, she is driven back into port, the claim of demurrage is not thereby revived. (a)

The rate of demurrage is what is expressed in the charter-party; or will be assessed by the jury upon evidence of the usage of merchants.

XXVII. The price or rate of demurrage is generally fixed by the charter-party; and is therein stipulated, in most cases, to be payable at so much *per day*. If the ship be detained beyond her days of demurrage, as specified in the charter-party, the sum payable *per day*, under the charter-party, for the demurrage there allowed, is *prima facie* the measure of compensation for the extended time. But it is said to be open to the ship-owner to shew that more damage has been sustained, and to the freighter to shew that there has been less, than would be compensated by the rate of demurrage reserved. In covenant upon a charter-party, for detaining a ship beyond the stipulated time of demurrage, the plaintiff claimed a compensation for the extended time, at the rate mentioned in the charter-party for the stipulated days of demurrage, and the defendant only paid into court half that rate. Lord Ellenborough left it to the jury to say, whether the owner was entitled to so much as he claimed; and the jury found for the plaintiff, at the rate of 7*l.* *per day*, upon the principle above stated; eight guineas a-day being what the plaintiff claimed, and the defendant only having paid into court at the rate of 4*l.* (b)

XXVIII. If no rate of demurrage be expressed in the charter-party, there is no direct custom of trade to fix it. It may be regulated by the burthen of the ship, by the quantity of goods she is freighted to carry, or the damage which she is likely to receive from remaining in the port where she is detained, or the loss sustained by not being able to employ her in another service, or the like. The court will be governed by the opinions of mercantile men, conversant with such subjects, as to what may be a reasonable compensation for the use of the ship for the time, and under the circumstances she is detained.

Working days do not include Sundays, or custom-house holidays.

XXIX. When by the charter-party, or bill of lading, the freighter covenants with the master to unload the cargo in a certain number of days generally, or pay demurrage, it means working days, and not running days; (c) though it is best to express in the contract which is meant; and that is usually done to avoid all disputes upon the subject, especially as witnesses called on such sub-

(a) *Lannoy v. Werry*, 2 Bro. P. C. 60. *Jamieson v. Laurie*, 6 Bro. P. C. 474. *Abbot*, 196.
(b) *Moorson v. Bell*, 2 Campb. 616.

Sed quere.

(c) *Cochran v. Rothberg*, 3 Esp. 121. See this case cited *ante*.

jects are likely, either from ignorance or dishonesty, to differ in their testimony.—Working days, it seems, do not include Sundays, or custom-house holidays; but only such days as are, in the literal sense of the word, working days, in work of a similar nature. When there is a doubt upon the language of contracts of this sort, it must be explained by the usage. Accordingly, where a question of this nature came before Lord Eldon at *Nisi Prius*, he left the question to a special jury of merchants; and they found a verdict for the defendant, construing the general words of the contract to mean working, and not running days. “If,” said his Lordship, “no evidence had been offered, and I was to decide on the clause itself, I should have been of opinion it meant running days; and if so, the parties must abide by the contract, though incapable of performance. If it had been the case of inland trade, it must have meant working days, as the law of the country prohibits the working on any other.”

XXX. We shall employ the sequel of this Chapter in explaining some of those principles which the law lays down, for the purpose of interpreting the intention of the contracting parties in a charter-party. It may be generally premised, that with a view to the interest of trade, and to the exigencies of merchants in remote parts, the law gives as liberal a construction to these deeds as is possible; and, occasionally, in favour of the manifest will of the parties, dispenses with a rigid exaction of the rules of law as to the construction of deeds. But this indulgence of course is never extended so far as to trespass upon the great principles of the law, nor to pursue the particular equity of one class of cases at the expence of the certainty and precision of law in all. With this observation we shall proceed to state some of the chief cases, and explain the principle upon which they have been decided.

Principles which the law has followed in giving a liberal interpretation to charter-parties.

Construction of charter-parties.

XXXI. In *White v. Parkin*, (a) the parties had entered into an agreement by charter-party, that the ship should take in her lading in some port in the British channel: but they afterwards entered into a parol engagement, that the ship (which was at that time lying in the Thames) should immediately commence her lading, and should pay hire to the ship-owner from the day of such commencement. The court held, under these circumstances, that such parol agreement was binding, inasmuch as it did not contradict, nor was inconsistent with, the charter-party. Lord Ellenborough observed, that though parties could not dispense by parol with the performance of any of the covenants in a deed,

White v. Parkin.

(a) 12 East. 578. and see *post*.

there could still be no objection to an earlier inception of the service than that which was covenanted for under the deed. A parol agreement must not contradict a covenant under deed: but it may assist or precede it.

Johnson v.
Greaves.

XXXII. In *Johnson v. Greaves* (a) an action was brought against the charterer, for having procured an insufficient licence, under which the vessel was seized and detained, but afterwards restored. But as it appeared upon the trial that no licence was actually necessary for the voyage, though the merchant and ship-owner, under a misconception, had contracted for one in the charter-party; it was held by the court that, as no licence was necessary, the merchant was not answerable on the covenant for the consequences of an alleged insufficient licence. Upon the same principles of equity, in *Havelock v. Geddes*, (b) when the merchant had conditioned with the owner that an extra number of men should be taken at his expense to work the ship, but that he (the merchant) should not be called upon to pay them, until the ship's discharge, or return from her voyage; the ship being accidentally burnt in the West Indies, the court held that the merchant was still liable.

Havelock v.
Geddes.

Davidson v.
Gwynne.

XXXIII. Again, in *Davidson v. Gwynne*, (c) where it was conditioned in the charter-party that the merchant should have the disposal and direction of the ship, but where the master, upon leaving the port of London, signed bills of lading for delivering his cargo at Lisbon, and thereby made himself answerable for such delivery, it was holden by the court that the merchant could not afterwards change the direction of the ship to Gibraltar, without giving up the bills of lading to the master, or at least offering a sufficient indemnity against any claims that might be made upon him by the holders thereof.

XXXIV. In the charter-parties of earlier times, it was a very usual clause that the ship should sail with the first fair wind. In *Constable v. Cloberie*, (d) the defendant pleaded against the payment of freight, that the ship had not so sailed, but had waited some days; not, however, imputing any unreasonable delay, but merely negating the circumstance that the ship had sailed with the first fair wind. The court held that the substance of the contract must be understood as conditioning against delay, and not that the ship should sail with the next wind, which changes every hour, and that the merchant must pay the money.

(a) 2 Taunt. 344.

(b) 10 East. 555

(c) 12 East. 381.

(d) Palmer 397.

XXXV. Upon the same principles of equitable interpretation, if there should be a breach of any covenant in a charter-party, the courts of law will consider such breach according to its peculiar nature and circumstances: they will not judge the contract to be annulled by the violation of some immaterial covenant; but will consider, under all the circumstances, whether such covenant be a condition precedent, or a condition subsequent; whether its subject matter affect the whole consideration, or whether it only impairs and diminishes, takes away some advantage, or attaches some inconvenience and loss to the interest of the party affected by such breach. In the first case, that is, where the condition broken is manifestly a condition precedent, and goes to the root of the contract, the courts will of course adjudge it to be a total failure of the agreement, and therein a forfeiture of all the stipulations under it. But where the breach only *partially* affects the main consideration, and can be compensated in damages, the courts will require it to be made the subject of a cross action. It is scarcely necessary to say, that to a condition, precedent or subsequent, no technical words are necessary: whether a condition be precedent or subsequent depends upon the nature of the transaction, and the meaning of the parties.

Of the construction of covenants and conditions in a charter-party.

XXXVI. The case of *Bornman and Tooke (a)* was decided upon this principle. It was an action for freight, by a ship-owner, against a merchant who had hired a ship upon a charter-party, in which it was covenanted that the ship should take in its full load of timber with all possible expedition at Riga, and should thence sail "with the first favourable wind" direct to Portsmouth. The ship arrived at Portsmouth, and delivered her cargo, which was accepted by the merchant. But the merchant refused to pay the freight, under the allegation that the ship had not sailed direct from Riga to Portsmouth, but had unnecessarily put into Copenhagen, where she was detained until that place surrendered to the English arms; and in consequence of which deviation he had been obliged to have fresh insurances upon the cargo. Lord Ellenborough decided that this was no condition precedent, but only a general stipulation, that there should be no unnecessary delay; and that, if there were any, the merchant should be compensated according to the circumstances. To hold, indeed, that any short delay in setting sail, or that any trifling departure from the direct

Every breach of covenant does not annul the contract. Distinction of conditions precedent and subsequent.

(a) 1 Campb. 377. See likewise *Ritchie v. Atkinson*, 10 East. 295. and *Davidson v. Gwynne*, *ante*, and

12 East. 381. All the old cases are collected in *Ritchie v. Atkinson*.

course of the voyage, would entirely annul contracts of this species, and leave ship-owners without remuneration, who had actually brought the cargo, would be to introduce a rigour fatal to all contracts of this kind. His Lordship concluded with observing, that if the merchant had suffered any loss, or had been put to any extraordinary expense, he should have made it the subject of a cross action. The distinction was, where the covenant went to the whole consideration, and where it only affected it partially. Where mutual covenants go only to a part of the consideration, and a breach may be compensated in damages *pro rata*, there the party injured, having the means of remedy on his covenant, shall not plead it as a condition precedent.

Thomson v.
Inglis.

XXXVII. Thomson v. Inglis (a) was determined upon the same principle. In this case the defendant, the charterer of a ship, had covenanted to load and dispatch her from Tobago, in the West Indies, so that she might sail with the convoy appointed to depart from thence the first of August. The ship arrived in Tobago on the 8th of July, and was ready to take in the homeward cargo on the 14th, and might have taken in her whole cargo within a week if it had been ready. But on the 22d of July, when she had taken in only a part, the convoy sailed; and the captain, deeming himself bound in duty to consult the safety of the ship, sailed with it, though an offer was made by the merchant of a complete cargo, if he would stay a few days longer. Under these circumstances the ship-owners brought an action against the merchant for the whole freight upon the covenant. The merchant pleaded in defence, that he had covenanted only to have the cargo ready by the first of August, and that it would have been ready by that day. But Lord Ellenborough held that this was no defence. Such covenants must have a reasonable construction, which was that the ship should be loaded so as to depart with the convoy appointed to sail on the first of August; but which, in fact, might sail a day sooner or a day later; that is, on or about that time: the merchant, therefore, was bound under this stipulation to load the ship in time, if it arrived in time. The ship had arrived in time, and the merchant had failed.

Fothergill v.
Walton.

So also in the recent case of Fothergill v. Walton. (b) By charter-party between the ship-owners and freighters, the ship-owner covenanted to take on board six pipes of brandy at Havre, and to proceed therewith to Terciera, and there take on board a

(a) 3 Campb. 428 See likewise
Hotham v. E. I. Company, 1 T. R.
638.

(b) 8 Taunt. 516. See also Deffrell
v. Brockebank, 4 Price 36.; which
is to the same point.

cargo of fruit or other goods, as the freighters might think fit, and proceed to London or Bristol, as might be ordered by the freighters, and there make a right and true delivery of the fruit. The freighters covenanted to pay certain freight for the fruit and the brandy (the freight of the brandy to be taken out in fruit at Terciera) and guaranteed the ship a full cargo home. The Court of Common Pleas determined upon this charter-party, that the covenant to take the brandy to Terciera was not a *condition precedent*, but a distinct and independent covenant; and therefore, the owner, in an action of covenant against the freighters for not having put a full cargo of fruit on board at Terciera, having averred general performance, the declaration was held good on special demurrer.

XXXVIII. It is unnecessary to explain the principle of these decisions by further cases of the same nature, as they all proceed upon the same point, of the actual intention of the parties, or of the degree and kind of breach of covenant as regards the main consideration of the contract. Thus, in the above case of *Thompson v. Inglis*, if the ship had not arrived in time, the breach would have been upon the part of the ship-owner; and though the merchant must have paid freight for what the vessel actually brought, and could not have pleaded the breach of covenant as a total discharge from his obligations under the charter-party, he might have brought a cross action for the injury sustained, and would have recovered according to the amount proved. But in *Shadforth v. Higgin*, (a) where a ship was freighted to go in ballast to Jamaica, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived in Jamaica by the 25th day of June, but the vessel did not arrive till some days afterwards, it was held that such *fixed time* was a condition precedent, and was to be considered as the farthest time which the party would grant; and that under these circumstances the merchant freighter was entirely discharged from his contract to furnish a cargo.

Shadforth v.
Higgin.

The principle of the decision in both of the above cases is obvious. In *Thompson v. Inglis*, the exact point of time was merely secondary; the main and primary object of the parties was, that the ship should be loaded in time for the convoy, on *whatever* day it should sail. But in *Shadforth v. Higgin* the time was manifestly a primary consideration, being the furthest day which the merchant could allow. The different decisions in the two cases originated in this difference of circumstances.

(a) 3 Campb. 385.

Havelock v.
Geddes.

Ritchie v.
Atkinson.

XXXXA. One of the points decided in *Havelock v. Geddes* (a) proceeded upon the same equity as respected the time of repairing the ship. In this case the ship-owner had covenanted in the charter-party, that the ship should, at his expense, be forthwith made tight and strong for a voyage for twelve months to foreign parts, under which covenant the merchant immediately put his cargo on board. Upon the return of the vessel the merchant refused to pay the freight, alleging that the owner had not *forthwith* duly made his vessel tight and strong, in consequence of which she had been compelled to stop at Portsmouth to repair, and he had been delayed in the receipt of his cargo. But the court held that he was liable to the freight for two reasons; in the first place, because he had accepted the ship, in the condition in which she was, immediately after the charter-party, and put his goods on board. And, secondly, because the ship-owner had performed the voyage, though perhaps imperfectly: but that if the merchant had sustained any injury in consequence of such imperfect performance, he might receive satisfaction in damages by a cross action. The same point was again ruled by the court in *Ritchie v. Atkinson*, (b) to which we had before occasion to refer upon another subject. The plaintiff, in this case, had not taken on board the whole cargo for which he had covenanted in the charter-party: but having taken part, and safely delivered it at home, he brought an action against the merchant for the freight of such part. The merchant refused to pay any freight under the alleged breach of covenant. But the court held that, having performed some of the service, he was entitled to the specific remuneration agreed upon, and that the merchant must bring a separate action for the breach of the covenant.

When there is a total failure of consideration, and no part of the service rendered, the courts of law will hold that it is a total breach of the contract. Therefore, in *Havelock v. Geddes*, if the owner's neglect in the first instance, had precluded the freighter from making *any* use of the vessel, that would have gone to the *whole* consideration, and might have been insisted on as a bar to the action. But where the merchant has received some benefit, and the owner, although he may not have performed the whole of his duty, has rendered some service by the performance of a part, the courts of law will give a remuneration, *pro rata*,

(a) 10 East 555. Cases and authorities on this point might be multiplied without end. In *Boone v. Eyre*, 1 H. Black. 273. in the *notes*, the

general rule is very ably and perspicuously laid down.

(b) See *ante*, and 10 East. 295.

for such part, and, as before said, refer the merchant to his cross action for the particular breach.

XL. But this principle of the equitable interpretation of contracts is necessarily limited by certain maxims to which the courts of common law are bound to adhere, and beyond which they will not explain nor correct the letter of charter-parties. In cases exceeding the possible limits of this indulgence, the parties, if they suffer any consequences which they did not intend or foresee, must take the consequence of their own ignorance, or negligence, in the construction of their deeds; and must not expect to receive relief at the expence of the established principles of law. The same rule will apply where the specific stipulations of a charter-party, though manifestly hard and unequal, are the express and positive engagements of the parties; such as where they are obligatory upon one party, and optional to the other. Therefore, in *Shubrick v. Salmond*, (a) where the master of the ship had absurdly agreed to reach an island on a day certain, and that if he arrived upon that day, the merchant should be *absolutely* bound to give him freight, but if later, that it should be optional with the merchant whether he should lose the whole voyage, the court held that as he had made the engagement, he must abide by it.

The court will not relieve against express and positive stipulations, though ~~per se~~ *per se* hard and absurd.

Upon the same principles, though the courts of law, in the event of any partial breach of covenant, will not suffer the ship-owner to lose the reward of the greater portion of the service which he may have performed, they will still not extend this indulgence to cases in which a breach, apparently partial, goes to the whole and main object of the voyage; and, therefore, in *Osgood v. Groning*, (b) where the failure of the performance, though well intended, went to the root of the contract, it was adjudged by the court to be a non-performance of the whole contract.

A contract of charter-party is broken by even an innocent non-performance where it affects the whole contract, —where the thing is not imperfectly done, but not done at all.

XLI. Whether mutual stipulations in a charter-party are, or are not, dependent one on another; and, therefore, whether or not an action lies for one party without previous performance, or offer to perform the stipulations on his side, depends on the nature of the case under consideration. In the construction of such contracts, conditions are to be taken as precedent, subsequent, or independent, according to the fair intention of the parties; (to be collected from the instrument) and technical words, encountering such intention, must yield to it. (c) Thus where, by charter-party

Storer v. Gordon.

(a) 3 Burr. 1637.

(b) 2 Campb. 466.

(c) *Storer v. Gordon*, 3 M. and S.

308. See also *Ritchie v. Atkinson*, 10 East. 295. where all the cases are collected.

Storer v. Gordon.

to proceed from London to Naples, and there to deliver the outward cargo; and, *having so done*, to receive on board a return cargo, restraint of princes excepted; and the freighters covenanted that they would provide, at Naples, a full and complete return cargo; and that 1750*l.* should be paid on delivery of the outward cargo, which should be considered as earned for *outward* freight; the Court of K. B. held, that in covenant against the freighters for not providing a return cargo at Naples, they could not plead in excuse of performance, that the *outward* cargo was seized by the government at Naples, and was delivered to them; for the delivery of the outward cargo was not a *condition precedent* to the providing a return cargo: but the delivery of the outward cargo was a condition precedent to the payment of the 1750*l.*; and, therefore, a breach assigned for non-payment thereof was, under these circumstances, not sustainable. (a)

Miscellaneous cases.

XLII. An offer by one party, with an immediate ability of performance, to perform a condition precedent in a charter-party, with a refusal to accept it, is equivalent to performance. (b). And where the performance of a condition precedent, on the precise day stipulated, is rendered impossible, from the deed having been executed after the day; it seems that the right arises by a subsequent performance. But where, by the terms of a charter-party, freight was reserved monthly, and payable on the arrival of the ship in her port of discharge, an offer by the owner to perform the voyage, and refusal by the freighter, are not equivalent to actual performance. (c) The non-performance of a covenant by the owner to make the ship tight for a voyage of twelve months gives the merchant an option of repudiating his contract; and is not a condition precedent to the recovery of freight after the freighter has taken the ship into his service, and used her for a certain period. (d) So, likewise, sailing with the first convoy is not a condition precedent, unless expressly made so; (e) and *semble*, that where the freighter covenants to pay freight in consideration of the covenant by the owner in the charter-party, (one of which is, that the ship shall sail on or before a certain day,) it is not a condition precedent. (f) So, where the agreement was, that the master should

(a) *Storer v. Gordon*, 3 M. and S. 308.

(d) *Havelock v. Geddes*, 10 East. 555.

(b) *Hotham v. E. I. Company*, 1 T. R. 438.

(e) *Davidson v. Gwynne, ante.* and 12 East. 331.

(c) *Hall v. Casenove*, 4 East. 477. and *Smith v. Wilson*, 8 East. 437,

(f) *Hall v. Casenove*, 4 East. 477. and *ante.*

load a complete cargo, and proceed and deliver the same on being paid freight, at so much *per* ton, it has been determined that the delivery of a complete cargo was not a condition precedent to the right of freight. (a)

Construction
of charter-
parties.

XLIII. Under this head of the construction of charter-parties, several cases have arisen not peculiar to this species of contract, but which it is necessary to touch slightly upon in this place. Thus where, by the terms of a charter-party, freight was paid in advance, and without the master's fault the voyage was not performed, and the ship captured, it has been decided that the money cannot be recovered back. (b) If the performance of a contract become impracticable through the act of God, and there is no provision therein exonerating the contractor from performance under such circumstances, he must answer for the breach of it in damages. (c) Thus a freighter, who covenants generally to load a cargo, and is prevented from so doing by the prevalence of the plague, is liable on his covenant. (d) Here, indeed, the principle is obvious: the freighter is the adventurer who chalks out the voyage; and is to furnish, at all events, the subject matter out of which freight is to accrue. If the performance of his covenant be rendered unlawful by his *own* government, the contract is, of course, dissolved: but if, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, (e) but must answer the breach in damages. So, likewise, a contract for the carriage of goods is not dissolved by an embargo suspending its performance: but must be carried into execution on the removal of the embargo. (f) But where a foreign ship is chartered in England by a British subject, with the usual exception, *against restraint of princes*, and performance of the voyage is prevented by an embargo laid by the British government on ships of that nation, a British subject is discharged from his contract. (g)

Miscellaneous
cases.

XLIV. In all cases, indeed, where a contract is unlawful, or becomes so, after it is made; or where, by performing it, a man would derogate from the public duty which he owes to his country;

(a) *Ritchie v. Atkinson*, 10 East. 295.

(b) *De Silvale v. Kendal*, 4 M. and S. 37.—See this case *post*.

(c) *Shubrick v. Salmond*, 3 Burr. 1637. and *Ritchie v. Atkinson*, *ante*, and 10 East. p. 53.

(d) *Barker v. Hodgson*, 3 M. and S. 267.

(e) 2 *Vernon* 212. and *Blight v. Page*, 3 B. and P. 295. See *post*.

(f) *Hadley v. Clarke*, 8 T. R. 259.

(g) *Touteng v. Hubbard*, 3 B. and P. 291. and see this case *post*.

under such circumstances the non-performance of it is matter of peremptory obligation, and therefore an excuse in law. But the mere apprehension of a hostile embargo, founded on a general rumour, though, in fact, an embargo was laid on six weeks afterwards, will not justify a breach of contract. (a)

Upon the principle before laid down, no action will lie on a contract made with reference to an illegal voyage; thus, to carry goods securely, shipped without the licence of the South Sea Company, to a place within the limits of their exclusive trade; for the illegality of the *principal* contract destroys all derivative rights by virtue of it. (b)

XLV. But though a contract in violation of the law may be void; yet it may not be illegal in the usual sense of that term, if the party does not contemplate any illegality in *his* share of the contract; that is, it has been holden, in many cases, that it is not sufficient to invalidate a contract for a sale of goods, that the vendor knew they were to be applied to an illegal purpose, unless he have a share in the unlawful transaction. (c) By analogy, therefore, to this case, where A. commissioned B. to get a charter-party effected on his ship, Russian built and British owned, and she was accordingly chartered to go to America, and to take in there a cargo of permitted goods, rice and cotton being specified, and to sail therewith to Cadiz, Lisbon, or Gottenburgh, as directed; but by previous agreement it appeared to have been within the contemplation of the parties to carry the goods to some port in the United Kingdom, and that the ship should carry no licence: the court held, that this was not an illegal contract, so as to deprive A. of his right to his commission for procuring the charter-party to be effected. (d)

Master, &c. of
Trinity-House,
v. Clarke.

XLVI. It is a general rule that the *charterer*, not the *chartered party* of a ship, is to be considered as the owner: but there are exceptions to this rule; namely, where by the terms of a charter-party, coupled with the particular nature of the service in which the ship is employed, an intention to vest the temporary property in the chartered party can be inferred. One of the terms in the case of the Master of the Trinity House v. Clarke was, that the

(a) Atkinson v. Ritchie, 10 East. 530. *ante*, and *post*

(b) Wilkinson v. Londonsack, 3 M. and S. 117. and Toulmin v. Anderson, 1 Taunt. 227. The South Sea privileges are now abolished, so far as relates to an exclusive trade.

(c) Hodgson v. Temple, 1 Marsh. 5.

(d) Haines v. Busk, 5 Taunt. 521. See likewise Sewell v. R. E. Company, 4 Taunt. 856. Where part of the voyage was illegal, *quare*, whether that part, *antecedent* to the illegal voyage, was not insurable?

charter-party "granted" the ship, and "let it to hire and freight," which are proper words of lease. The nature of the service was the transport service. Upon a question who was to be considered as the owner, whether charterer or chartered party, the court of K. B. decided, that though the former was in general to be so considered; yet that the particular terms of the charter-party, coupled with a consideration of the peculiar nature of the service contracted for, shewed an intention to transfer the ownership to the chartered party. (a)

XLVII. Upon the same principle, although the proprietor of the ship should furnish the chartered party with a master and crew to navigate the vessel, such a circumstance would not be inconsistent with the possession and temporary property of the vessel being in the chartered party. The court, indeed, in the case above cited, considered such possession of the master and crew as not reserved by the proprietors of the ship to restrain or interfere with the full and free use of the ship by the chartered party, but as subsidiary and subservient to such use. "It is," said Lord Ellenborough, "the same thing as the hire of a waggon and team for a certain time, the proprietor of the waggon stipulating that the waggon should be driven, and the horses taken care of, by his own waggoner and boy, whom he was to feed. In such a case it could hardly be made a question, that the waggon and team were in the possession of the hirer during the harvest, or whatever the term might be for which they were hired."

When the possession of the ship remains in the charterer, and not in the chartered party.

XLVIII. It must be admitted, however, that the terms made use of in charter-parties, "to charter a ship," are, in their general construction, equivocal. They may either mean a contract in the nature of a demise of the *hull* of the ship, or a mere contract for the conveyance of goods, by which the *space* and *capacity* of the ship are let to the freighter. In the former case, according to the authorities, the chartered party would have a temporary property, and an entire possession, not controlled by the circumstance that the ship-owner furnished a master and crew to navigate the ship. In the latter case, the charter-party would not differ from a bill of lading of the *whole cargo*; and the possession would remain in the proprietor of the ship, and not in the freighter. Many important points, as to the right of lien for freight, depend upon this distinction, which will be more accurately considered in another Chapter.

(a) Master, &c. of Trinity House, subject will be discussed, more fully, s. Clarke, 4 M. and S. 288. But this *post*, in the Chapter on Freight.

In the case of *Saville v. Campion*, it was covenanted by a charter-party, that the owner should receive on board, in London, all such goods as the freighter thought fit to load, and should proceed therewith to Madras. That all the cabins but one, which was reserved for the use of the captain, should be at the disposal of the freighter, who was to appoint a supercargo to superintend the stowage of the goods; but the captain and crew were employed and paid by the ship-owner. The Court of K. B. held, that there being no express words of *demise* of the ship itself in the charter-party, the freighter did not thereby become the owner for the voyage, but that the possession continued in the ship-owner, and that he, therefore, had a lien on the cargo for his freight. (a)

XLIX. It still remains to touch slightly upon a few miscellaneous cases not easily distributable under any particular head. In actions upon charter-parties, the most difficult questions are those which arise upon their construction; not only as respects the covenants, whether they are precedent, subsequent, or independent, but as respects the reciprocal duties of the owner and freighter, and the admeasurement of damages in the event of any breach of contract. In an action to recover damages for not procuring a cargo, (according to the terms of the charter-party,) to consist of various articles chargeable with different rates of freight, it has been decided, that the proper measure of damages was to estimate the freight by means of an average, so as neither to take the greatest possible freight, nor the least. (b) And the freighter cannot, in calculating the amount of *dead* freight, insist upon the specific burthen of the ship as stated in the charter-party, unless the misrepresentation had been fraudulent. But where, by a charter-party, a ship was described to be of the burthen of two hundred and sixty-one tons, and the freighter covenanted to load a full and complete cargo; the Court of King's Bench decided, that the loading of goods, equal in number of tons to the tonnage described in the charter-party, was not a performance of the covenant, but that the freighter was bound to put on board as much goods as the ship was capable of carrying with safety. (c)

L. In the construction of a charter-party, where the instrument proposed in the commencement to contract for the charterer and his partner; but, throughout the remainder of the deed, all the stipulations and obligations were in the name of the freighter;

(a) *Saville v. Campion*, 2 B. and A. stated.

503. and see this case *post.* in the Chapter on Freight, compared with the other decisions, which are there

(b) *Thomas v. Clarke and Another*, 2 Star. N. P. 45.

(c) *Hunter v. Fry*, 2 B. and A. 422.

it was decided, that the words in the beginning of the instrument, for himself and partner, ran through the whole, and bound them both equally, since the name of such partner need not have been introduced at all, if it had been intended that the other alone should be responsible. (a) But where the master of the plaintiffs' ship entered into a charter-party as agent for the plaintiffs, with the defendant, a partner in the house of M. and Co., for the delivery of goods on a stipulated freight, and the goods were delivered to M. and Co., the consignees in the bill of lading, the Court of King's Bench determined that the plaintiffs could not maintain *assumpsit* against the defendant for freight. (b) The judgment given in this case proceeded upon a technical rule of pleading; namely, that a contract *under seal*, having been entered into by the captain, on behalf of the plaintiffs, with one of the partners in the house of M. and Co., the plaintiffs were precluded from bringing an action of *assumpsit* against that very partner, for the identical thing already contracted for with their own captain. For where the interest is the same as that secured by deed under seal, no *assumpsit* will lie.—For freight, stipulated for by deed, is not recoverable in *assumpsit*.

LI. Where the charter-party first provided for the rate at which freight was to be paid; next, the time when the earning of it was to commence, and the period when it was to end; and then went on to provide for the time when the freight was to become payable, both of what should become due upon the ship's arrival at the destined outward port, and what should subsequently become due after delivery of the cargo; but contained no provision whatever for the payment of any freight, until such arrival; the Court of King's Bench, in construing it, held that these provisions constituted but one entire continued covenant, qualified as to the mode of payment; the payment of any freight being made to depend upon the arrival at the outward port, and not at all events. The loss having happened before that arrival, no provision was made by the covenant for the payment of any freight; and as the charter party did not appear to have defectively stated the intent of the parties, the Court would only look at the terms in which the contract itself was expressed. (c)

(a) *Thomas v. Clarke and Another*, 2 Star. N. P. 45. under seal.

(b) *Shack v. Anthony*, 1 M. and S. 573. See *Leslie v. Wilson*, 3 Brod. and Bing. 171., where the owners may be sued, though the master contracts

(c) *Gibbon v. Mendez*, 2 B. and A. 17. And see *Smith v. Wilson*, 8 East. 437. *Mackrell v. Symond*, Abbott, 345. And *Byrne v. Pattinson*, *ibid.* 347.

As an obligation by deed cannot be dissolved but by deed; so, where the plaintiff covenanted by a charter-party to unload the cargo at the port of London, a mere parol substitution of the port of Liverpool, instead of London, was held not to confine the effect of the deed. (a)

Relaxation
from the strict
terms of the
charter-party
for an obvious
common bene-
fit.

Puller v. Stain-
forth.

LII. Under the principles of giving charter-parties a liberal interpretation, the courts have occasionally relaxed from demanding the strict execution of the letter of the deed, even as respects the voyage, where the deviation has been of a kind in which the consent of the freighter might reasonably be implied. And, therefore, in *Puller v. Stainforth*, (b) where it was covenanted in the charter-party that the master should remain forty days at Petersburg to dispose of the cargo, and if he should not succeed in that time, that he *might* then bring it back to England; but instead of which the master, not having succeeded in disposing of it in the forty days, proceeded to Stockholm, and there sold the cargo with the best intentions, and took in other goods for freight, with which he returned to London; it was decided by the Court of King's Bench that he had committed no deviation within the substantial meaning of the charter-party; and, therefore, was entitled to his freight under the deed, after carrying to the account of the merchant the freight earned in bringing the goods from Stockholm.

Bell v. Puller.

LIII. In *Bell v. Puller* (c) the Court of Common Pleas pronounced another decision upon the same principle. The circumstances of this case were, indeed, almost exactly similar with the preceding. It was covenanted in the charter-party, that the merchant should remain forty days at Petersburg to dispose of a part-cargo of lead; and, if he should not be able to effect it in that time, he should bring it back to England. Upon bringing it back, the merchants were to pay him 2700*l.*: but if the voyage succeeded, they were to pay 4000*l.* Having waited the stipulated time without effecting the sale, and thinking that he might find an advantageous market at Stockholm, or at least by taking in a homeward cargo there might save the merchant from a total loss of the freight of the lead, the master, instead of immediately returning to England, sailed for Stockholm, and there took in a homeward cargo of hemp, with which and the lead he then returned to England. The clear profit of bringing this cargo was about 2400*l.*; the sums payable under the charter-party as before said, if the voyage had been

(a) *Thomson v. Brown*, 1 Moore, 272.

358. This case appears to overrule (b) 11 East. 232.

Hotham v. E. I. Company, 1 Dougl. (c) 2 Taunt. 285.

successful, would have been about 4000*l.* The master offered to settle the account with the merchant by charging him with what would have been due if he had loaded the ship homeward, and allowing him the benefit of the clear earnings that had been made; thus demanding from him about 1600*l.* But *this he refused*; and insisted that the earnings should go in diminution of the 2700*l.*, &c. and that the master was, therefore, entitled only to about 600*l.* Upon this the master brought an action in the Court of Common Pleas, upon the charter-party, for the non-payment of the 2700*l.* with the per centage and gratuity. At the trial the jury gave a verdict for those sums. An application was made to the court to reduce the verdict to the sum that had been previously offered by the merchant: but, after argument, the verdict was allowed to stand. (a)

The principle of the decision in this case appears to be, that the parties themselves, in their charter-party, had fixed the sum to be paid for the failure of their voyage; and that the voyage having failed, but the master having performed his full duty, he was entitled, as a matter of course, to this sum. That, as far as respected the return cargo, he was bound, indeed, to bring back the lead; but as a greater part of his ship was unoccupied, and as the occupation of it with a cargo for himself did not interfere with any possible interest of the merchant, whose business was in fact concluded, there could be no objection to his taking in such a portion of the homeward cargo on his own account. Mansfield, C.J., indeed, said, that he considered it as a mere contract to take certain goods to Russia, upon sale or return; and that he could see no reason why, in the return voyage, the captain might not earn what else he could, by taking other goods on board for his own benefit. "In common cases of charter-party," said his Lordship, "there usually is a covenant that the freighter will supply a certain quantity of homeward freight at the foreign port; and if he does not, the plaintiff has his action on the covenant against him. But suppose, instead of leaving the damages open, he stipulates, If I cannot provide a cargo for you, I will pay you so much,—would not the owner, in that case, have a right to take goods on board for his own account? His ship is at full liberty for him to make any other profit of; and in such a case he doubtless would insist on more or less liquidated damages, according to the chance he foresaw of getting freight home from the place where he was going; he would raise or lower his demand accordingly; and in

Construction
of charter-
parties.

Bell v. Puller.

(a) Vide Abbott, 211.

Construction
of charter-parties.

such case I see no reason why the person who had stipulated to pay such liquidated damages, should be discharged from any part thereof on account of the profit which the plaintiff might make by the cargo supplied by any other person."

Construction
of the charter-
parties of the
East India
Company.

LIV. The charter-parties of the great public companies, and more particularly those of the East India Company, are usually conceived in more rigorous terms than those between private merchants and ship-owners; the value of the cargo being so much greater, and the company itself having less opportunity of personal supervision. Accordingly, in the interpretation of these charter-parties, there is a wider scope for the indulgent consideration of the courts of law; and they will exercise the indulgence within those limits which will preserve the existence of, and give effect to, a liberal and equitable intention upon the part of the company, but without, on the other hand, departing too widely from the specific stipulations of the parties.

Hotham v. E. I.
Company.

The Court of King's Bench proceeded upon this principle in the case of *Hotham v. The East India Company*. (a) In this case the charter-party contained the usual clause of the East India Company's charters, that the company should not be liable to pay any freight or demurrage, unless the ship arrived in safety in the river Thames, and there made a right delivery of the whole and entire cargo. Another clause in the same charter-party provided, that if any of the homeward goods, when delivered, should be wet or *damaged*, the ship-owners should take them at the invoice price. But by a third clause they were not to be charged with any damage, except such as should appear to be *sea-damage*. The ship, in her return home, met with a storm, and was stranded, whereby part of her cargo, consisting of saltpetre, was lost, and the principal part of what remained was damaged; but that was got out of the ship and sent to London, where the vessel was afterwards brought, with a small part of the cargo still remaining on board. The defendants contended, that if they were liable to freight at all under these circumstances, they were, by the above clauses in the charter-party, entitled to a deduction in respect of the goods lost, as well as those which were damaged, and the expenses of bringing home the latter, and rendering them marketable. These points came on to be tried on different feigned issues; and the jury found that the plaintiffs were not liable to pay for the goods lost or damaged; but that they were liable to the defendants for their proportion of saving the goods, by way of general average.

(a) Douglas, 277.

“if the ship do not arrive in safety in the Thames, the company shall not be liable for freight and demurrage, or for any demands in respect of the ship’s earnings in freight voyages for the company, or on account of any other employment;” for, construing the latter words according to the context, they mean the employment of the ship in any other voyage or adventure; and in no degree apply to the putting of the passengers on board.

LVI. Another question arose upon the charter-party in the same case. It was one of the conditions of this deed that the company should allow the master 200*l.* for every calendar month he remained in India for the current expenses of the ship; such payment to be from the first port of delivery in India, and to continue until the ship should be discharged from her last port in India, or China, to return to Europe. In the case in question the ship was ordered from England to Madras, from Madras to Canton, and from Canton with her lading to England. In the course of her voyage to England she encountered a storm off the coast of India, and suffered so much damage that she was obliged to put into Bombay to refit. Here she remained for some months; for two of which months she was employed in some short service by the company, and was paid accordingly. The master, upon his return, demanded the 200*l.* monthly money for the whole time he had been at Bombay; and contended that Bombay was his last port of departure under the charter-party. But the court decided against his claim, and held that the last port under the charter-party was Canton.

Effect of the
usual clause in
the Company’s
charters that
they may em-
ploy the ship in
trade or war-
fare.

LVII. It is another usual condition in charter-parties by the East India Company, that the company’s presidents and consuls abroad may employ the ship hired either in trade or warfare. This clause came under the consideration of the Court of King’s Bench, in *Dobree v. The East India Company*. (a) The company’s presidents abroad having not only employed the plaintiff’s ship to form part of a military expedition, but very considerably altered her form and appointments, in order to adapt her to the carriage of guns, the plaintiff insisted that they had exceeded their power under the above clause in the charter-parties. But the court decided that they had not exceeded it, and had only to restore the ship to its original state; and that the owner was not entitled to a greater sum than under the charter-party.

LVIII. Another principle to which the Court will resort in the interpretation of charter parties, and by which it will occasionally

(a) *Dobree v. E. I. Company*, 13 East. 290.

limit the capacity of the strict letter, is the usage of trade; for as the parties are necessarily supposed to be acquainted with the usage and customs of merchants in their own particular trade, it is a natural inference that such usages make a part of the general and understood circumstances under which they contracted, and that they are only omitted because supposed to be matter of concession upon both sides. Lord Kenyon, and after him Lord Ellenborough, frequently acted upon this principle, requiring only that the usage should be good, reasonable, and general; in a word, the *law merchant*, and not a bye-law, resolution, or agreement, of any mere body, or club of mercantile men. But it would seem that such usage will be sufficient, if it be universal amongst the company or association to which the two parties to the action, the plaintiff and defendant, belong. And, therefore, in *Donaldson v. Forster*, (a) where it was the stipulation of the charter-party that the merchant should have the exclusive use of the cabin, and where the master alleged a usage that, in charter-parties so expressed, the master was still allowed to take out a few articles of private trade; Lord Kenyon allowed the usage to be given in evidence in diminution of the strict obligation of the charter-party.

Construction
of charter-
parties.

Of the usage of
trade.

LIX. But though the courts, as before said, will assist the equity of cases, and will give effect to the presumed intention of the parties, by construing the particular stipulations by reference to the context, and by selecting of two meanings that which is most fair and equitable, it is necessary to repeat that they will not make new contracts for the parties, nor set aside positive and specific engagements, which, however hard, admit only of one interpretation. And, therefore, in *Blight v. Page*, (b) before cited, the Court of King's Bench required the execution of the positive contract, or satisfaction for the non-performance, though the party had bound himself to what he could not perform.

LX. The case of *Blight v. Page* is a leading case, and must therefore be shortly stated. It was an action upon a memorandum for charter, by which it was stipulated on the part of the owners, that the ship should sail to Liebau, and there load, from the factors of the defendant, a full cargo of barley, and proceed therewith to Berwick, and deliver the same on being paid freight at the rate of 8s. 6d. per quarter, with two-thirds port charges and pilotage, (restraints of princes and rulers excepted,) one half of the freight to be paid on the right delivery of the cargo, and the remainder in two months

Blight v. Page.

(a) Abbott, 222.

(b) 3 B. and P. 295. and see *ante*.

This case is cited in the note to
Tonteng v. Hubbard.

following ; and the ship was to be allowed to remain on demurrage ten days over and above her running, or lay days, at 3*l.* *per diem*. On her arrival in Liebau Roads, the captain was informed by the factors of the defendant, that the Russian government had prohibited the exportation of barley ; and that it was, therefore, out of their power to furnish the intended cargo. The captain, however, entered the port ; and, after continuing there forty-nine days, returned in ballast to Berwick. The action was brought to recover 459*l.* for freight, 27*l.* 18*s.* for charges, and 30*l.* for ten days' demurrage. It was argued, for the defendant, that the exceptions of the restraints of princes and rulers was applicable both to owners and shippers : but Lord Kenyon, C.J., decided against the defendant on this point, upon the above general principle of law ; and, therefore, held that the plaintiff was entitled to recover the freight and charges : but, with respect to the demurrage, he held, that as it appeared that notice was given before the captain entered the port, that the factor could not furnish a cargo, there was no pretence for making the plaintiff liable to that charge.

CHAPTER II.

BILLS OF LADING.

We have before had occasion to observe upon the exact analogy between the ship-owner, as a carrier by sea, and the common carrier by land; and to add, that from this consideration of their common nature, the law, when not qualified by the contract of the parties, imposes upon both relations the same duties and the same risks and liabilities. Their forms of business and dealing have likewise the same general resemblance. Thus the bill of lading of the ship-owner, (or his master,) is nothing more than his formal receipt as a carrier, by which he acknowledges that he has received certain goods on board his ship; and obliges himself to deliver them to the consignee or his assigns, "in like good order and condition as he received them, *the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kinds, excepted.*" (a) It may be unnecessary to observe, that the common law liability of a land carrier comprehends all accidents and losses whatever, whether by negligence or mere contingency; the act of God and the King's enemies only excepted; and that under this liability the carrier is answerable for loss by fire. From the exact analogy of the two characters of the ship-owner and the land carrier, the common law would doubtless give the same extent to the liability of the ship-master, unless it were limited by this express precautionary restriction in the bill of lading. (b)

The nature of a bill of lading.

I. Where a vessel is hired by charter-party the merchant is usually the hirer of the whole of such ship; and the charter-party, as observed in the preceding Chapter, is the deed and contract under which she is let. When the goods are shipped in pursuance of this contract, the master delivers to the merchant bills of lading; the charter-party being the agreement to carry and convey, and the bill of lading being the evidence of the shipping of the particular

Bills of lading usually given by the master, upon goods shipped under charter-parties.

(a) These are the usual expressions in bills of lading; but they are not universally adopted. See *post*.

(b) It is also limited by act of parliament. See *post*.

Of the nature
and properties
of a bill of
lading.

merchandise to be conveyed in pursuance of the contract. But the bills of lading, which are more specifically such, are those which are usually given by the master or owner of a ship employed as a *general carrier*; and, in that character, receiving the property of various merchants, unconnected with each other, and engaging to convey their respective goods to the place of the ship's destination. Upon receiving such goods, the master, in the first instance, merely gives a written acknowledgment of having received them on board, and immediately afterwards signs two, or sometimes three, of the more formal acknowledgment and obligation, termed a bill of lading; one of which bills of lading is kept by the merchant for himself; a second transmitted to his consignee, factor, or agent abroad, by the post or packet; and the third usually sent to the same person by the master of the ship, together with the goods. But it will be prudent, in all cases, for the master to keep a copy of the bill of lading for himself. The substance of this bill of lading, as above mentioned, is the formal acknowledgment of having received the goods on board; and the engagement to deliver them to the consignee or his assigns, he or they paying the freight agreed, with the customary *primage* and *average*. Such bill of lading, therefore, may be considered as containing three specific stipulations. The first, that he the master will deliver the goods in like order and condition in which he received them to the consignee or his assigns. Secondly, that he expressly excepts himself from any liability for loss, damage, or accident, arising from the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever. And, thirdly, that he shall be paid the freight agreed upon "before delivery," with the accustomed *primage* and *average*. When the ship is homeward bound from the West India Islands, which send their boats to fetch their cargo from the shore, there is introduced a saving out of this exception "*of risk of boats so far as ships are liable thereto.*" And in that case, the whole clause of the exception is as follows:—"The act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted." (a)

Exceptions in
bills of lading
in the West
India trade.

(a) By a bill of lading a ship-owner undertook, that goods should be delivered safe, "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the

seas, rivers, and navigation of whatever nature and kind soever, *save risk of boats, so far as ships are liable thereto, excepted.*" The goods having been dispatched from the ship, in

II. A ship employed in the general carrying trade is termed a *general ship*, a name applying to distinguish it from vessels taken up upon charter-parties. When it is intended to employ a ship in this general carrying trade, it is usual to give notice of such intention by advertisement of printed papers or cards, mentioning the name and destination of the ship, her burthen, and (if during a period of war,) whether she is to sail with any and what convoy, and other matters relating to the voyage. This advertisement is understood by merchants as a special engagement, assurance, or warranty, to the shippers; and accordingly becomes a part of the contract, although not afterwards repeated in the bill of lading. Hence, if a general ship have been thus advertised for a particular voyage, and her destination be afterwards altered, the owner is bound to give specific notice of the alteration to every person who ships goods on board. Accordingly, in *Peel v. Price*, (a) a ship-owner was held liable for special damage to a merchant, whose goods he had received under the notice of one voyage; and had afterwards changed the destination of the ship, and performed his voyage by a circuitous course, without any notice of the change. The action was in the form of a special action on the case for deceitfully representing that the defendant's ship would sail from the port of London to Messina and Naples, and then altering her destination to Naples and Messina, whereby the plaintiff, who had shipped goods on board her for Messina, and effected policies of insurance to cover that risk, was afterwards forced to effect other policies at a higher premium, giving the ship leave to sail to Naples before going to Messina. The defendant had printed and circulated a card, stating that this ship was to proceed to "Messina and Naples." One of these cards had been received by the plaintiff, but at what time did not appear. No freight offering, the defendant, about the month of April, altered the destination of the ship in this amongst other respects, that she was to sail to "Naples and Messina." A fresh card was printed and placed in the defendant's counting-house. But there was no evidence that the plaintiff saw it; nor was it delivered to him. The ship sailed to Naples in the first instance, and the plaintiff effected policies in the manner stated in the declaration. It was proved to be customary to alter the destination of ships when freight cannot

The owner of a general ship is bound by the notices or advertisements issued by him respecting the ship's voyage, &c.

Peel v. Price.

her boat, according to the usual course of trade in the West Indies, were, together with the boat, lost in a hurricane. It was held, that the ship-owner was not liable, under the

terms of the bill of lading, to make good the loss. *Johnston v. Benson*, 1 Brod. and Bingh. 454.

(a) 4 Campb. 243.

Co. had become insolvent; and the flax being demanded by Peacock and Co., it was delivered to them upon an indemnity. Under these circumstances Reynolds brought his action. The only difficulty in the case was, that though Cooper and Co. were in possession of a bill of lading, and had sold the cargo to Reynolds by means of it, it could not be produced in evidence, not being stamped. In the absence, therefore, of this document, it was contended, that there were neither the means of transfer, nor the evidence of it: that all the decisions upon this subject had proceeded on the ground, that the possession of the bill of lading was symbolically the possession of the goods, but without it the property could not vest in the consignee, and he could not transfer it to another. But Lord Ellenborough held, that Cooper and Co. had become the purchasers of the flax, and had completed their title to it by accepting the bills of exchange. The property, therefore, had vested in them, and they had not exceeded their right in disposing of it. Peacock and Co., the consignors, after having received the bill of exchange, were in the situation of paid vendors. Therefore, when the flax was deposited at the wharf, his Lordship said he was of opinion it was received by the defendant, (the wharfinger) on account of the plaintiff, and ought to have been delivered up to him.

But a transfer of a bill of lading is not absolute, where the first purchaser himself received it on a condition; such condition being expressed therein.

Of conditions in bills of lading.

VI. But if the consignee, or first buyer of the cargo, shall have himself received the bill of lading upon some condition, and such condition be expressed in the bill of lading, so that the bill carries a notice of this qualification upon the face of itself, when produced in the market, a second purchaser from such buyer cannot derive a greater right than the first buyer himself possessed, as he buys with full notice of the condition and limitation. *Barrow v. Coles (a)* was decided upon this principle. The house of Norton and Fitzgerald, at Demarara, had drawn a bill of exchange upon Voss, in London, payable to their own order, and indorsed it to the plaintiff, at the same time annexing to it a bill of lading of the cargo of coffee, with an indorsement upon it, making them deliverable to Voss, if he should accept and pay the draft; if not, to the holder of the said draft. The bill of exchange, and bill of lading, being sent to Voss, he accepted the former, and detached the latter from it. He then indorsed the bill of lading for a valuable consideration to the defendant: but he did not pay the bill of exchange. But Lord Ellenborough held, that the special indorsement on the bill of lading ought to have made the defendant

(a) 3 Campb. 92.

inquire whether the condition on which the coffee was delivered to Voss had been fulfilled; and that, after the dishonour of the bill of exchange, the property in the coffee vested in the plaintiff, who had a verdict accordingly.

VII. The extent and effect of the right of stopping *in transitu* by an unpaid consignor belongs to another part of this work. It will, therefore, be sufficient to observe in this place, that where the consignee is in the relation of an actual buyer to the consignor there the property vests in the consignee immediately upon its being delivered on board of ship, or to an agent of the consignee in this country. (a) In this case the master, or ship-owner, is the mere carrier of the goods for such purchaser. It is true, indeed, as will appear in the Chapter on Stoppage *in Transitu*, that such goods are under certain circumstances liable to be arrested by the consignor: the right of stoppage *in transitu* being one of those equitable rights, to assist which the law relaxes very considerably from its more formal rules; and, under this principle, requires a more complete delivery to defeat the right of the consignor, in this respect, than is sufficient in all other cases to vest the possession and property. (b)

VIII. As the equitable right of a creditor, or of a correspondent with mutual dealings, is effectually as good as that of a buyer for value from the consignor, the law regards this relation with the same favour as the former; and, under this principle, admits the property to be vested, or rather to be removed out of the hands of the consignor, by a less perfect delivery than is required between principal and factor. The general rule, under these circumstances, is, that the indorsement and delivery of a bill of lading to a creditor conveys the whole property in the goods from the time of its delivery. *Vertue v. Jewell* (c) is a recent decision under this principle; and indeed deserves a more than cursory consideration, as incidentally involving the general effect of the indorsement of bills of lading with or without notice. It was an action of trover by the indorsee of a bill of lading against a master of a ship refusing to deliver the cargo assigned under it. A merchant at Yarmouth, of the name of Bloom, had shipped a cargo of barley on board the sloop *Adolphus*, of which Jewell, the defendant in the action, was master. The bill of lading made the barley deliverable in the port of London to the order of the shipper; and was indorsed by him to Burrows and Winn, corn-factors and corn-

Effect of the indorsement of bill of lading to a creditor, or correspondent with mutual dealing.

Vertue v. Jewell.

(a) *Dixon v. Baldwin*, 5 East. 175.

(b) Delivery to the consignee's agent defeats this right, *ibid.* 175.—
But see the cases collected and com-

mented upon, *post.* in the Chapter on Stoppage *in Transitu*.

(c) 4 Campb. 31.

however, of Bloom being indebted to them on the balance of accounts, divested him of all control over the barley from the moment of the shipment. His Lordship added, that the dishonour of the bills of exchange made no part of the case, the rights of the parties depending only upon the state of things, when the bill of lading had been signed and indorsed.

IX. The law regards the transfer, or indorsement of a bill of lading by a factor, or mere agent of the consignor, with less indulgence; and for the purpose of preventing the frauds too frequently committed by the abuse of the large power of these agents over the cargo, the courts of law confine them as strictly as possible within their understood commission to dispose of the cargo. But they are still the servants and trusted agents of their principal; and upon all mercantile principles their acts, within their implied commission, must bind their consignors; and any sale by them, being a sale by those commissioned to sell, must be absolute. Hence, an indorsement of a bill of lading by a factor for a *bona fide* consideration is a conclusive sale against his principal. But a factor cannot *pledge* the goods of his principal by indorsement and delivery of the bill of lading, any more than by the delivery of the goods themselves; though the indorsee has dealt *bona fide*, and did not know that he was a factor. An important decision under this head occurred in the case of *Newsom and Thornton*. (a) In trover for a quantity of beef, it appeared that the plaintiffs in the action, who were Irish merchants, in December, 1802, shipped the beef in question on their own account, consigned to Church as their factor, for sale; and the bill of lading, which was to deliver to order or assigns, being indorsed by one of the plaintiffs, was transmitted to Church. Soon after the arrival of the bill of lading it was indorsed by Church; and deposited by him with the defendants as a security for 200*l.* advanced by them to him, it not appearing that they knew the beef had been consigned to him as factor. He stopped payment in June; and was afterwards declared bankrupt, not having paid for the beef, which the defendants got possession of, and refused to return, though the freight and other charges were offered. The usual credit was three months; therefore, the bill of lading (which was within that date) conveyed to persons conversant in the trade, as the defendants were, an intimation that the goods were probably not paid for; though that circumstance does not appear to have

Effect of indorsement or transfer by the factor or consignee without value.

A factor cannot alienate the goods of his principal by a *pledge* of the bill of lading. *See* *vide* 4 Geo. 4. c. 83. which gives power to the factor, under certain circumstances, to pledge.

(a) *Newsom v. Thornton*, 6 East 17. by a new act of parliament, 4 Geo. 4. But see the alteration made in the law c. 83 ;—concerning which, see *post*.

had much weight in the decision, which proceeded on the general ground; that a factor cannot pledge the goods or effects of his principal. Lord Ellenborough, in his direction to the jury, stated, that the beef having been consigned to Church as a factor, gave him no authority to pledge the goods, but only to sell them for his principal; and, therefore, he had no authority to pledge the bill of lading, which was the mere symbol of the goods. Upon the ground of the good faith of the indorsee, and his total ignorance of the character of the indorser as a factor, a motion was afterwards made to set aside the verdict which had been obtained for the plaintiffs; upon which occasion his Lordship said that it was a direct *pledge* of the bill of lading, and not intended by the parties as a *sale*. He added that a bill of lading would, indeed, pass the property upon a *bona fide* indorsement and delivery, where it was intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended: but it cannot operate further. That if the factor had been in possession of the goods themselves, and had proposed to *sell* them to the defendants *bona fide*, the property would have passed by the delivery: but not if he had only meant to *pledge* them, because it was beyond the scope of a factor's authority to *pledge* the goods of his principal. The symbol, therefore, said his Lordship, shall not have a greater operation to enable him to defraud his principal, than the actual possession of that which it represents. The principal who trusts his factor with the power to *sell* absolutely shall so far be bound by his act: but the defendant shall not extend the factor's act beyond what was intended at the time; and here only a *pledge* was intended, which he had no authority to make. "I consider," said his Lordship, "the indorsement of a bill of lading, apart from all fraud, as giving the indorsee an irrevocable uncountermandable right, to receive the goods; that is, where it is meant to be dealt with as an assignment of the property in the goods; but not where it is only meant as a deposit by one who has no authority to pledge them; and having been dealt with in this case only as a deposit, it could not be made into a sale in order to give it effect."

Of principal
and factor.

X. In consignments made to factors questions of difficulty have often occurred, in cases where the factor has come under acceptances for the consignor: and the courts have taken a distinction between cases where bills are accepted on the *faith of a particular consignment*, constituting thereby a specific pledge of the cargo; and cases where there is a mutual credit only between the factor and his principal. Where a factor accepts bills on the *faith*

of a particular consignment, he will not only have a lien upon the consignment when it comes into his possession, but will also have the bill of lading pledged to him as a security *by anticipation*. (a) But where there is a mere account current, or mutual credits, between the principal and factor, he will not have such an interest in the consignment, that the indorsement of the bill of lading to him will divest the right of an unpaid vendor to stop the goods *in transitu*. This point came expressly before the court in *Patten v. Thompson*. (b) In that case, the plaintiffs, who were merchants at West Port, in Ireland, sold to Hickman and Co., who were merchants at Dublin, one hundred tons of wheat, and loaded it on board ship to their order. For this wheat the plaintiffs sent an invoice and bill of lading to Hickman and Co., and drew bills on them for the amount; which bills Hickman and Co. accepted. The wheat, thus bought and paid for by bills, was consigned by Hickman and Co. to Hodgson and Co., of Liverpool, their factors there for sale, to whom also they sent a bill of lading, indorsed to their order. The original bill of lading made the wheat deliverable at Liverpool to Hickman and Co. or assigns; and the same bill of lading was indorsed by them to deliver the said wheat to Hodgson and Co., or order. A long course of dealing had taken place between Hickman and Co. and Hodgson and Co., and they were under acceptances for Hickman and Co. to a considerable amount, which were running at the time of the consignment, and after the arrival of the wheat at Liverpool. These bills exceeded the value of the cargo in question, and also the securities which they had belonging to Hickman and Co. in their hands. Hodgson and Co. having the wheat consigned to them, and having the bill of lading indorsed to their order, effected an insurance upon it in their own names. In the mean time Hickman and Co. became bankrupts; and the plaintiffs, on the arrival of the ship at Liverpool, with the wheat on board, gave notice not to deliver to Hodgson and Co.; and the question was, whether the plaintiffs, under the circumstances, had a right to stop *in transitu*. The defendants in the action were the assignees of Hodgson and Co., who had become bankrupts before the arrival of the vessel, and who claimed the wheat by the indorsement of the bill of lading to themselves, of which bill of lading they contended that they had become purchasers by the acceptances they had given to Hickman and Co. Lord Ellenborough said, That the defendant, in order to succeed

Of consignments to a factor; when they constitute a lien on the cargo and bill of lading, and when not.

Patten v. Thompson.

(a) *Haille v. Smith*, 1 Bos. and Pul. page in *Transitu*.
563., and see *post*, Chapter on Stop-

(b) 5 Maule and Selw. 350.

in his claim, must make out this position, that wherever a principal consigns goods to his factor for sale, and is at the same time in a course of drawing on the factor *upon account*, this single circumstance of there being *mutual credits* between them does of itself give to the factor a right, not merely to detain such consignments as shall come to his hands, but to anticipate the possession, and keep it against the unpaid seller. If there had been any specific pledge of this cargo in the course of the transaction,—if bills had been accepted by the Liverpool house on the credit of this particular consignment, or if it had been so stipulated, this would have been a different case. But it appears from the whole transaction, that this is a mere naked case of a factor, to whom a quantity of wheat is consigned for the purpose of being sold by him, and who is to account for the sale, and render the proceeds to his principal. In such a case, if the factor has received the proceeds, he will be entitled to his lien upon them to the extent of his indemnity: but he can have no rights *antecedently* to possession in respect of the consignment, but such as he has in his representative character of factor, in order to effectuate the object of the consignment.

M'Combie v.
Davies.

XI. In a case (a) subsequent to *Newson v. Thornton* the Court of K. B. decided, that where a broker pledged the goods of his principal, the pawnee, though he had given a valuable consideration, could not detain them against the original owner. For although the broker had a lien on the goods for the balance due from the principal to him at the time of such pledge, the lien was personal, and not transferable by such tortious act of the broker. And in *Martini v. Coles*, (b) which is a more recent case, the court repeated the same doctrine; and decided that a factor could in no case pledge the goods of his principal, unless he had a special authority, or where the principal has held him forth as the owner, in which case the factor would have the same rights. Therefore, where goods were consigned from abroad to a factor, to be sold on account of the consignor, and a bill of lading was sent to deliver the goods to the factor or his assigns, and the factor afterwards indorsed and delivered the bill of lading, together with the goods,

Martini v.
Coles.

(a) *M'Combie v. Davies*, 7 East. 5. If a factor pledge the goods of his principal, the latter may recover the value of them in trover against a pawnee, on tendering to the factor what is due to him, without any tender to the pawnee. *Daubigny v.*

Duval, 5 T. R. 604. *Patterson v. Tash*, Str. 1178.

(b) 1 Maule and Selw. 140. and *Jackson v. Anderson*, 4 Taunt. 24. See the cases referred to in the argument and judgment.

to the defendants, as brokers, with instructions to do the needful, and the defendants made advances to him on the credit of those and other goods, without knowing that he was not the owner of them: the court held, that the defendants could not retain the goods against the consignor, until payment of the debt due to them from the factor on account of these advances. In this case Lord Ellenborough observed, that it was much to be regretted that a bill of lading, instead of being launched into the world as an instrument of equivocal import, should not have designated on the face of it in what character the consignment is made, where it is intended that the consignee should fill that of factor *only*. And Bayley, J. observes, that cases may, perhaps, exist where the principal would be bound by the pledge of his factor.

Of bills of lading and consignments to factors and brokers.

Seemle, cases may exist to warrant a factor in pledging the goods of his principal.

XII. We have deemed it necessary to cite the above cases, chiefly with the view of shewing how the law stood until the late act of 4 Geo. 4. c. 83, which has introduced an important amendment in general trade, as to the authority which it gives to a factor to pledge the goods of his principal. This act, which is an undoubted innovation on the old law, rendered necessary perhaps by the exigencies of commerce, enacts—1. That persons in whose names goods shall be shipped shall be deemed to be the true owners, so as to entitle consignees to a lien thereon in respect of their advances, either of money or negociable securities; provided the consignees have no notice, that the consignors are not the *actual* proprietors of such goods. 2. That any person may take goods or a *bill of lading in deposit or pledge* from any consignee: but such person shall not acquire any further interest than the consignee possessed. 3. But the act preserves the right of the true owner to follow his goods while in the hands of his agent, or of his assignees in case of bankruptcy, or to recover them from assignees, &c. upon paying the advances secured upon them, &c. (a)

Alteration of the law by 4 Geo. 4. c. 83. which empowers factors and consignees to pledge goods, in certain cases, to a certain extent.

But notwithstanding the present statute, empowering the factor to pledge in certain cases, he has no authority to sell but *for money*; he cannot barter the goods of his principal. Therefore where a factor bartered the goods of his principal, the Court of King's Bench held that no property passed, and that the principal might maintain trover against the party with whom the goods were bartered, although the latter was wholly ignorant that he had been dealing with a factor only. (b)

XIII. The description of the consignee, namely, whether cre-

Different effect of bankruptcy

(a) See this act in the Appendix.

(b) *Guerreiro v. Peile*, 3 Barn. and Ald. 616.

on consignments of different characters.

Effect of bankruptcy on consignments.

ditor, purchaser, or factor, has another important effect in regulating the character of consignments made by merchants before bankruptcy, but not arriving till afterwards. The general rule of course is, that property does not change in the hands of the carrier; and, therefore, that a consignment, made before bankruptcy, but not arriving till afterwards, remains the property of the consignor; unless, indeed, the delivery be made by the order and upon the account of the consignee, and be a complete alienation from the consignor. In the case of a consignment to a factor, therefore, there can be no difficulty. The property remains the consignor's, and passes into the hands of his assignees. But in the case of a consignment to a creditor or person with mutual dealing there is more doubt. As the equity of such a case is very strong, the courts of law have always shewn a disposition to favour it, and to consider such an order or consignment in the nature of an executed payment or completed delivery; and, as such, not reverting in the assignees of the consignor, though sent before bankruptcy, and not arriving till after.

XIV. A case of this kind came before Lord Ellenborough in an action by the assignees of a bankrupt, (a) against one of his creditors, who had received the proceeds of a shipment after bankruptcy, by the effect of an order given long previously. The bankrupt had been captain of a ship in the service of the East India Company. Being about to sail from this country, he left a general power of attorney with the defendant, to whom he was indebted in a considerable sum of money. He carried out with him, as an investment, to Calcutta, some cases of saffron. Not finding a market for them there, he sent them to Bombay, addressed to the house of Forbes and Co. In his letter of advice to that house, dated 8th of January, 1812, he says, "I leave the disposal of the saffron to you; and, when sold, please remit the proceeds to our mutual friend Mr. Hotson, of London, on my account." Forbes and Co. sold the saffron before Jameson's bankruptcy, and remitted the proceeds to the defendant: but he did not receive them till after the bankruptcy. It was contended, for the assignees, that the bankruptcy operated as a revocation of the order of the 8th of January, 1812. The defendant could have no lien, as he had no possession; and the money, before it reached him, had become the property of the plaintiffs. But Lord Ellenborough said, that the defendant had a right to retain the money in satisfaction of the debt due to him from the bankrupt. When the

(a) *Alley and Others, assignees of Jameson, a bankrupt, v. Hotson*, 4 Campb. 325.

order of the 8th of January, 1812, was given, the bankrupt had a power to give it; and being coupled with an interest, it was not countermanded by his subsequent bankruptcy. The transaction was entirely free from fraud. This was a case of mutual credit. If a factor has a lien on goods, he has a right to the price, although received after the bankruptcy. In the same manner, this money was subject to the defendant's claim before it could vest in the assignees. (a)

XV. The same point was indeed effectually decided in an earlier case, where money had been borrowed upon a bill of lading before its arrival, and whilst the borrower was solvent, but the bill of lading was not indorsed till after bankruptcy. (b) The borrower, in this case, had received advice from his correspondent abroad, that a cargo was shipped on his (the borrower's) account, upon which he immediately effected an insurance; and upon the security of this policy, and an agreement to assign the goods and indorse the bill of lading upon its arrival, he procured a considerable loan of money. Upon the arrival of the bill of lading he was a bankrupt: but he indorsed the bill of lading, and the goods were delivered to the lender under it. Under these circumstances the assignees brought an action of trover, alleging, that as the bill of lading had not been indorsed till after an act of bankruptcy, the goods could not have passed by it. At the trial at Nisi Prius the jury found a verdict for the plaintiff, under the direction of Grose, J., who held, that the legal property remained in the bankrupt till the indorsement, and that he could not dispose of it after his bankruptcy in prejudice of his creditors. But a new trial having been granted, this verdict was set aside, on the ground that the agreement and deposit of the policy, &c. gave the defendant an equitable lien upon the property, and the assignees could only claim subject to such lien. In a very elaborate judgment given upon this occasion, Ashhurst (contrary to the spirit of recent decisions) put the whole question upon the ground of this equitable lien, instead of considering it, as it would appear it ought to have been considered, as a question of delivery. The goods being shipped on account, and notice of such shipment having been sent in a letter of advice, certainly constituted such a delivery as was sufficient to support an assignment by the consignee, and therein to give effect to an agreement to assign. (c) But Ashhurst, J., as above said, put the question entirely upon the ground of an equitable lien. He said that, as between a person who has an equitable

An agreement to assign upon a loan of money, made by a consignee, on receiving a letter of advice of a shipment on his account, is an assignment, or at least an equitable lien, effectual against his assignees.

(a) *Olive v. Smith*, 5 Taunt. 56.

and *Haille v. Smith*, 1 Bos. & Pull. 563.

(b) *Lempriere v. Pasley*, 2 T. R. 485.

(c) *Davis v. Reynolds*, 4 Campb. 267.

lien, and a third person who purchases the goods for a valuable consideration, and without notice, the prior equitable lien shall not overreach the title of the vendee; for the title of him who has both a fair possession and an equitable title shall be preferred to that of a mere equitable interest. But as between the person who has the equitable lien and the assignees, if the lien subsisted before the bankruptcy, they shall never recover or retain the property without discharging the money due. The party who has the equitable lien ought not to be on a footing with the rest of the creditors, for whom the assignees are trustees; for the creditors at large trusted to a personal credit, but he trusted to a pledge. The money lent to the bankrupt would never have become a part of the assets of his estate, had it not been lent upon the credit of the goods pledged; and when the money was taken out of the bankrupt's effects and repaid, they were only just where they would have been if the money had never been advanced. As between the person having the lien and the assignees, they must stand in the place of the bankrupt, and take his property subject to all the equitable liens to which it would have been subject in the hands of the bankrupt himself. By the act of bankruptcy they only get the legal right. The bankrupt himself had the legal right before the bankruptcy: but he could never have retained the goods against the lien, without paying the money borrowed. So neither could the assignees. Nor if the party obtained the possession, could they get it from him without paying the money advanced; for retaining the property, agreeable to a lawful stipulation between him and the bankrupt previous to the bankruptcy, could never, even in a court of law, be said to be a wrongful conversion. It makes no difference, added he, whether there be an actual assignment of the bill of lading, or only an agreement to assign; as neither conveys more than an equitable title. It might be a great inconvenience to commerce if it were laid down as law, that a man could never take up money upon the credit of goods consigned, till they actually arrived in port. There seems to be no inconvenience on the other side; nor can it be any inlet to fraud, for no other person can be induced to lend money on the credit of the cargo, after the party has delivered over all the documents to him who has the first lien.

Of the nature
of an equitable
lien on a bill
of lading.

The property
of the goods
during the voy-
age follows the

XVI. Though bills of lading are, according to the usage of merchants, the ordinary instruments by which cargoes are vested and transferred, and pass by delivery and indorsement, (a) the property,

(a) *Lickbarrow v. Mason*, 5 T. R. 745. See also *Groning v. Meadham*, 683.; and *Hibbert v. Carter*, 1 T. R. 5. *Maule and Selw.* 189., where the

as has been stated above, may be transferred without them, the delivery of the cargo in this respect being subject to the same rules as the delivery of other goods; and, therefore, if a cargo be delivered to a ship-owner, like goods to a carrier, to be conveyed on account of, and at the risk of, the consignee, the property of such goods is immediately vested in the consignee by the shipment itself. (a) In this case the delivery is complete for all purposes, except against stoppage *in transitu* by the unpaid consignor, upon any breach of conditions by the consignee before the actual arrival. The property, indeed, during the voyage, follows the character of the consignee, and corresponds with the property of goods sent by land-carriers under similar circumstances. If the cargo be sent to a purchaser, the property is vested, as above said, immediately upon the shipment; and the loss during the voyage would, of course, attach to such consignee. If the cargo be sent to a factor for the mere purpose of sale, the property, during the voyage, and afterwards, till an actual sale by the factor, remains with the consignor. (b) If the cargo be sent to a creditor or correspondent, with mutual dealing, the property during the voyage will depend upon the mutual understanding under which it was sent; and will remain in the consignor, or pass to the consignee, accordingly as it is sent as a payment, or as a mere consignment for which the consignee is to find a market.

character of the consignee, and not the letter of the bill of lading.

XVII. It has been above said, that three bills of lading are usually made and signed; and there is, therefore, a possibility that there may be conflicting demands upon the captain by the different holders. Nothing, however, is here required of the captain but to act with good faith, and to the best of his judgment; and to make delivery of his cargo to the person who first demands it of him, upon presentment of a bill of lading, and under circumstances which do *not justify any suspicion of* such person having unfairly procured the possession of it. If he act differently, he is answerable, according to the circumstances of the case, to the person injured by his negligence, the bill of lading being not only the instructions of

Of the delivery under the bill of lading.

plaintiff, having received an order for goods, shipped them to the defendant, and transmitted to him the bill of lading indorsed, making the goods deliverable to order, or assigns; and on their arrival the captain withheld the goods, but the defendant afterwards recovered them in an action of trover. The court held that the plaintiff

might sue the defendant for goods sold and delivered, delivery on board ship being a perfect delivery.

(a) *Walley v. Montgomery*, 3 East. 590. and note *supra*.

(b) But see the new act, 4 G. 4. c. 83., giving power to the factor to pledge, in certain cases, the bill of lading.

between a bill of lading indorsed in blank, and an indorsement to a particular person; for it is a rule of the Law Merchant, that the indorsement and delivery of a bill of lading is an immediate transfer of the legal interest in the cargo to the assignee, provided it be an indorsement for value. But where goods are shipped without orders, the ownership is considered as remaining in the seller. (a) But an indorsement without consideration does not transfer the property; hence, such an indorsement to an agent, that he may receive the goods mentioned therein, will not, it should seem, entitle him to maintain trover in his own name. (b) But it is otherwise where a bill of lading is indorsed and delivered to a creditor as a security for his debt on his own account. (c) Again, where several bills of lading of different import have been signed, no reference is to be had to the time when they were signed by the captain, but the person who first gets legal possession of one of them, by delivery from the owner or the shipper, has a right to the consignment; and where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bona fide*, a delivery, according to the legal title, will discharge him from all. (d)

XIX. It has, however, been decided upon a principle of manifest equity, and in conformity with the usage of merchants in the port of London, that, where the master of a ship receives goods on board, and gives a receipt for them, it is his duty not to deliver the bill of lading, except to the person who can produce the receipt in exchange for it. (e) Again, where the freighter has appointed the destination of the vessel, and the master has taken in goods, and signed bills of lading accordingly, he cannot change it without first recalling the bills, or at least tendering an indemnity against them. (f) The reason is indeed obvious; the master is himself a party to such bills; and bound to deliver the consignment, under ordinary circumstances, to a *bona fide* indorsee. In an early case it had been holden that the indorsement of a bill of lading by a factor, to whom it was sent, for value, and without notice of goods at sea, transferred the property, though such factor

or indorsee of the bill of lading, to pay freight, should he claim and receive the goods under it. And see *post*, Chapter on Freight.

(a) *Lickbarrow v. Mason*, 2 T. R. 63.

(b) *Coxe v. Harden*, 4 East. 211.; and *ante*, p. 376.

(c) *Hibbert v. Carter*, 1 T. R. 475.

(d) *Caldwell v. Ball*, 1 T. R. 405.

(e) *Craven v. Ryder*, 6 Taunt. 433. and *Ruck v. Hatfield*, 5 Barn. & Ald. 652.

(f) *Davidson v. Gwynne*, 12 East. 381.

Cuming v.
Brown.

could not pledge the bill of lading or the goods: (a) But where the agents of the consignee, without his privity or confirmation, substituted other goods, in lieu of the original cargo, the substituted goods will not pass by a previous indorsement by the consignee of the bill of lading. But an indorsement by the consignee for a valuable consideration transfers the property, though the vendee knows that only acceptances, not yet due, have been given for the goods. (b)

Lickbarrow v.
Mason.

XX. The case of *Lickbarrow v. Mason*, before cited, had determined (c) that the consignee of goods, by the assignment of the bill of lading to a third person for a valuable consideration, might confer an absolute right and property upon such assignee, indefeasible by any claim on the part of the consignor; subject, however, to this restriction, that the assignment should be made with good faith. In *Cuming v. Brown*, the principle was more distinctly re-affirmed. In that case it was determined, that if the assignee of the bill of lading took the assignment *bond fide*, without notice of any such circumstances as ought in fairness to have tied up the hands of the consignee from a transfer, he acquired, in all events, a good title against the consignor; and that therefore, although he knew at the time that the consignor had not obtained an effectual payment for the goods, but had taken the consignee's acceptance, payable at a future day, not yet arrived; the consignor, nevertheless, could not defeat *his* title under the assignment, nor stop the goods *in transitu* upon the insolvency of the original consignee.

XXI. The other legal properties of bills of lading, and the extent of the rights of the holders, will fall more properly within the subject of a future Chapter; and more particularly the compass and limitation of the right, under such bills, with respect to stopping goods *in transitu*.

(a) *Wright v. Campbell*, 4 Burr. 3051. Stoppage *in Transitu*.

(b) *Cuming v. Brown*, 9 East. 506. See also *post*, in the Chapter on

(c) See the judgment of *Huller, J.* in this case, 6 East. p. 30, *in solis*.

CHAPTER III.

OF THE COVENANTS IN CHARTER-PARTIES—THE SEAWORTHINESS OF THE SHIP—THE LOADING, VOYAGE, AND DELIVERY.

HAVING in the two preceding Chapters considered the general nature of charter-parties and bills of lading, as the two usual instruments under which goods are conveyed by ship-owners for merchants; the order of our subject leads us now to treat of the due appointment and seaworthiness of the ship, by which such goods are to be carried; together with the manner of receiving, conveying, and discharging the cargo at the port of delivery. These requisites, which, as they necessarily belong to the masters and owners, are usually discussed by mercantile writers under the head of the *duties of master and owners* by virtue of charter-parties, appear conveniently to distribute themselves under the four members—of the due appointment and seaworthiness of the ship; the loading; the voyage; and the delivery. (a)

The fourfold division of the duties of master and ship-owners under charter-parties, &c.; *id est*, due appointment of the ship in stores, &c.; loading; voyage; and delivery.

I. And, first, as to the seaworthiness of the ship, and the due appointment in stores, &c.

The first stipulation, and usually the very first clause in every charter-party, is an agreement between the owner or master and the merchant, that "the said vessel shall be made by the said master (or owner) tight, staunch, and strong, sufficiently manned, and every way fitted for the voyage." This covenant of course comprehends the body of the vessel, her rigging and furniture, her provisions, and the crew; all of which, therefore, are agreed in the above stipulation to be in every respect fitted for the voyage, and for the due and safe navigation of the ship from her port of lading to the port of delivery. As the master is, therefore, bound to have his ship sufficiently appointed in all these particulars, a deficiency in any of them is a breach of his contract, and an injury

Seaworthiness and due appointment of the ship.

(a) See Abbott on Shipping, Part III. chap. 4, 5, 6.

Of the seaworthiness of the ship.

for which he is responsible, according to the damage. If the deficiency be so great as to render the voyage entirely fruitless, it would seem that the courts of law would consider the due appointment of the ship as a condition precedent, and upon this principle would not suffer the owner to recover any thing for a voyage which had been *wholly* injurious to the merchant; and to which the merchant might reply in substance the special circumstances discharging him from the obligation, and might, in addition, be entitled to maintain a cross action for the loss he had sustained. But, on the other hand, if the injury to the cargo be only partial, the most usual mode of procuring satisfaction for such damage, and therefore the mode which the courts encourage, is the payment of the freight under the charter-party by the merchant, and afterwards an action for the breach of covenant and injury against the owner. By this mode of proceeding, the extent of service rendered, or of the injury sustained in damage to the cargo by the unseaworthiness of the ship, is necessarily brought more distinctly to the attention of a court and jury than when they are joined together in the same action; and the one is pleaded in diminution of the other. This, indeed, appears to be the general and equitable principle of cross actions, not only as respects this subject, but all others; that unless the non-performance, negligence, or misfeasance, alleged in breach of the covenant, extend to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages. It has been determined, however, that if a consignee accept goods, he cannot defend himself from the payment of freight on the ground that they have been damaged by the voyage. (a)

Seaworthiness and sufficiency of the ship, a duty of common law, and therefore of large interpretation, and which will be presumed, if not expressed.

II. This engagement of the ship-owner, that his vessel shall be tight, staunch, &c., is, indeed, not so much a new engagement of the parties, between themselves, as a confirmation of the obligation imposed upon all carriers by common law. And thus, in *Coggs v. Bernard*, (b) Lord Chief Justice Holt said, "The law charges the persons (namely, common carrier, hoyman, master of a ship,) thus entrusted to carry goods, against all events but acts of God, and of the King's enemies;" so that a common carrier is an insurer against all perils or losses not within the exception. This common law duty gives a larger interpretation to the express stipulation of ship-owners, for the sufficiency of their ship, than

(a) *Shields v. Davis*, 6 Taunt. 65. and see 4 Campb. 119. and *post*.
Davidson v. Gwynne, 12 East. 381.; (b) 2 Lord Raymoud. 902.

would otherwise belong to it as a mere contract of the parties; and in the same manner will confine and restrict the legal acceptance of those precautionary notices, by which sea and river carriers, like land carriers, have sometimes attempted to qualify their engagement as common carriers.

III. In *Lyon v. Mills*, (a) the defendant, a ship-owner and carrier, had given notice, that "he would not be answerable for any loss or damage which should happen to any cargo which should be put on board any of his vessels, unless such loss or damage should happen to be occasioned by want of ordinary care and diligence in the master or crew of the vessel; when in such case he would pay to the sufferers 10*l. per cent.* upon such loss or damage, so as the whole amount of such payment should not exceed the value of the vessel on board whereof such loss or damage should have happened, and the freight of such vessel. And he gave further notice, that any merchant, or other person desirous of having their goods or merchandises carried *free of any risk*, in respect of loss or damage, whether the same should happen from the *act of God or otherwise*, might have the same so carried by entering into an agreement for the payment of an *extra freight*, proportionable to the accepted responsibility, on application to him or his agents. ~~But~~ Under the principle that the sufficiency of a ship's hull was a common law duty, it was held, by the Court of King's Bench, that the owner was liable for the damage suffered, notwithstanding his precautionary notice; for that the law presumed a promise by him that his vessel should be tight, staunch, and sufficient; and that his precautionary notice could have no further effect than to limit the responsibility of the owner, in those cases only where the law would otherwise have made him answer for the neglect of *others*, and for *accidents*, which it might not be within the scope of ordinary care and caution to provide against.

Lyon v. Mills.

The words "tight, staunch," and in every thing necessary for the voyage, and fitting for the navigation, manifestly comprehend not only the hull of the ship, but whatever is necessary to her navigation and due service, and extend to her furniture, crew and stores of all kind. It is, therefore, the duty of the master to provide ropes, &c. proper for the reception of the goods into the ship. She must also be furnished with proper dunnage, or pieces of wood placed against the sides or bottom of the hold to preserve the cargo from the effects of leakage, according to its nature and quality. Her crew, likewise, must be sufficient to navigate the vessel, both

Sufficiency of the ship comprehends furniture, crew, stores, &c.

as to number and to skill. This duty, indeed, is implied by common law under the general terms of the sufficiency of the ship. The parties, of course, may enlarge it, if they please, by express obligation; and, in such cases, the law will enforce the covenant as strictly as its terms. Therefore, in *Beatson v. Schank*, (a) where the master had stipulated in the charter-party, that his vessel should be manned in a certain proportion to its tonnage, and that the whole number of men should be constantly on board; it was held by the court that this was a positive and absolute stipulation, and that sickness, death, desertion, &c., were no excuse for its non-performance, the owner having stipulated against all events; and having, therefore, by implication, obliged himself either to the performance of the thing, or to an equivalent satisfaction, according to the nature and degree of the failure.

The ship papers necessary for the voyage are likewise comprehended within "what is needful, &c. for the ship."

IV. If the terms of the covenant in the charter-party be that the vessel shall be furnished "*with every thing needful and necessary for the voyage*," the master will be bound under such a stipulation to provide the vessel not only with the documents required by the laws of the country, but such as are required for her immediate admission into the foreign port mentioned in the charter-party. Therefore, in an action of covenant against the owner of a ship by a freighter who had hired her for a voyage to the Mediterranean, it was held that such a vessel required a bill of health, and that the master was responsible under the covenant for not having provided this document. The charter-party stipulated that the ship should be "tight, staunch, and strong, and well and sufficiently manned, tackled, apparelled, and furnished with every thing needful and necessary for such a ship, and for the voyage hereinafter mentioned." The assigned breach of covenant was, that a bill of health was needful, and had not been supplied. It appeared that a bill of health was a document not necessary for ships clearing outwards at the custom-house here, nor required by our laws to be taken by ships sailing to the Mediterranean; but that bills of health were issued to such ships, and generally carried by them. By the law of Sardinia, which had been long known to persons engaged in the Mediterranean trade, a bill of health is required from all ships, even from England; and without one they are obliged to perform quarantine. Upon the arrival of the ship in question, at Cagliari, she was put under quarantine for want of a bill of health, and the voyage was thereby greatly delayed. *Gibbs, C. J.*, held that a bill of health was a document neces-

(a) 3 East. 233. and *Blight v. Page*, *ante*.

sary for such a voyage, and was, therefore, within the covenant. It was not essential to the question that such a paper was not a ship's paper within the laws of this country. If it were necessary for the port whither the ship was sailing, and the captain had stipulated to provide all such necessities, it was, of course, within such a stipulation. The words needful and necessary for a voyage oblige the defendant to have on board every paper required to advance or facilitate the voyage. (a)

Levy v.
Costerton.

V. With respect to the seaworthiness of ships, the most important cases have arisen in questions of policies of insurance. There is, indeed, little distinction to be made between the nature and extent of this obligation from the merchant to the insurer, and that from the ship-owner to the freighter. We have said that, independently of the covenant in the charter-party, which only re-affirms and strengthens the general obligation, there is a tacit and implied agreement that the ship shall be seaworthy, and capable of conveying the goods in proper condition. It is not sufficient that the owner did not know that the ship was *not* seaworthy; for he ought to know that she was so at the time he chartered her. The sufficiency of the ship is the substratum of the contract between the parties; and a ship not capable of conveying the goods in a proper state is a failure of the condition precedent to the whole contract. The seaworthiness of the ship is not a question of fraud or good intention, but it is a positive stipulation that the ship shall be so; and, therefore, although the owner may himself have been deceived by the ship-builder, repairer, &c. if the vessel be in fact unseaworthy, have an insufficient bottom, or unsound timbers, it is a breach of a preliminary condition; and is fatal, as such, to the contract. (b) In *Eden v. Parkinson*, (c) which was a case on a policy of insurance, Lord Mansfield said, "By an implied warranty, every ship insured must be tight, staunch, and strong: but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after departure, and yet the underwriter will continue to be liable." But if a ship sail upon a voyage, and in a day or two become leaky, and founder, or is obliged to return to port without any storm, or visible or adequate cause to produce such effect, the presumption is, that she was not seaworthy when she was let out to

Of the seaworthiness of the ship.

(a) *Levy v. Costerton*, 4 Campb. 389.; and Holt's N. P. 170.

Charter-party, *post*, and perils of the sea.

(b) See further on this subject in the Chapter on Exceptions in the

(c) *Douglas*, 732.

sufficient crew, and a captain and a pilot of competent skill." On the ground, therefore, that there was no pilot on board when the accident happened, he was of opinion, there must be judgment of nonsuit. (a) And in a late case, in the House of Lords, Lord Eldon stated, that under this implied warranty, it is not only necessary that the hull of the vessel be tight, &c., but that the ship be furnished with *ground tackling*, sufficient to encounter the ordinary perils of the sea; and, therefore, where the best bower anchor, and the cable of the small bower anchor, were found defective, the ship was not seaworthy. (b) Upon the same principle, in an insurance case, the Court of King's Bench held, that there was a failure of the implied warranty; that a captain and crew of competent skill and knowledge for the voyage should be provided; the captain being so grossly ignorant as not to know Tarragona from Barcelona; the warranty in the policy being, that the vessel should not go higher up the Mediterranean than Tarragona. (c) So, likewise, it has been decided by Lord Ellenborough, that a vessel which is defective in sails necessary to facilitate her escape from an enemy, and to enable her to proceed with expedition, is not seaworthy; (d) nor if the crew be insufficient. (e)

Of the seaworthiness of the ship.

VII. We have deemed it necessary to state the above cases at some length; for though they principally arose in questions on policies of insurance, they may be extended by reasonable analogy to charter-parties and bills of lading. The obligation of the owner, in both cases, is to furnish a ship tight, staunch, and strong; in other words, seaworthy: and whenever a case arises with respect to damage to goods through the insufficiency of the ship, the question whether the master or owner is liable to make good the loss to the freighter will depend upon the point, whether the ship was in a condition to perform the voyage, and to convey the goods safely, at the time of making the charter-party, or loading the goods on board; or whether she became defective from subsequent accident, and the perils of the wind and sea, which are excepted in the contract.

VIII. It has been before stated, (f) that the master is bound to take on board a pilot of competent skill, where the usage of trade, or the laws of the country, require that the ship shall be put under pilotage. It is added, in the same place, that by 48 Geo. 3. c. 104. and 52 Geo. 3. c. 39., no master or owner is answerable for any

Pilotage necessary for the voyage, but under the limitation of the 48 Geo. 3. c. 104.

(a) The action was brought by the assured against the underwriters.

(b) *Wilkie v. Geddes*, 3 Dow. 57.

(c) *Tait v. Levy*, 14 East. 481.

(d) *Wedderburn v. Bell*, 1 Camp. 1.

(e) *Hunter v. Potts*, Selw. 937. n.

(f) See *ante*, Chapter on Pilots, and *Law v. Hollingworth*, 7 T.R. 160.

loss or damage by reason of no pilot being on board, unless in the case of either wilful refusal to take a pilot on board, or from negligence in not heaving to for the purpose of taking one on board who shall have offered himself.

Loading the ship.

IX. The second main requisite under the charter-party, and therein the second main duty of the master and owner, respects the loading the ship; that is, the receiving and stowing the goods in a due and seamanlike manner.

The usual stipulation in charter-parties under this head, is, that the master or owner shall, "with all convenient speed, receive on board, load, and stow, in a regular and proper manner, all such goods and merchandizes as shall or may be sent by the said freighter, alongside the said ship or vessel, in the said port of —, not exceeding what the said ship or vessel can conveniently and safely carry over sea, besides her provisions, tackle, apparel, and appurtenances; the master's cabin and the usual and necessary room for the ship's crew excepted."

The general rule of loading is to conform with the usage of the port.

X. The duty and mode of loading by ship-owners and masters have an exact analogy with a similar duty of land-carriers; and are governed by the same principle, and subject to the same responsibilities. It is regulated in a great degree by the usage of the port or place at which the lading is received. In ship carriers, as, indeed, in all other trades, the usage of the port or place is an implied condition of the contract. It is what is necessarily known to both parties as a usage; and, if omitted in the contract, is presumed to have been so omitted because a matter of notoriety to all persons concerned. The first duty of the master, therefore, is to receive his lading according to the custom of the particular place. In some ports it is his duty to receive the goods in the dock, or at the wharf or beach; and thence take them either immediately into his ship, or bring them off in boats. But he is not bound to take goods on board which may endanger his ship, such as gunpowder, &c.; unless his contract be to do so. Nor is he bound to take contraband or unlicensed goods; or goods which cannot be imported or exported without a particular authority or licence; unless such authority or licence be produced to him. The owner is bound to get the proper clearances for the ship, and the freighter for the cargo. In *Corban v. Downe* (a) it was found to be the custom of the port of London, with respect to goods intended to be sent coastwise, that the responsibility of the wharfinger ceases by delivery of them to the *mate* of the vessel upon the wharf. The general rule is, that the responsibility of the master begins where that of the wharfinger ends; and that he

(a) 5 Esp. N. P. C. 41.; and see *Morse v. Slue*, 1 Vent. 190, 238.

becomes liable for the goods from the moment they enter his custody, by a due delivery to himself or his petty officer. The sufficiency of such delivery is a question of fact for the jury.

XI. The master is bound in the same manner as a land carrier by the acts of his servants; and if he should depute any of the crew to receive the goods for him, or should order them to be delivered generally on board his ship, such delivery would of course be sufficient to bind himself. But no man is to trust the servant of another beyond the point at which the master had himself ceased to trust him; and, therefore, a mere general delivery to the crew would probably not be sufficient, as the proper functions of the crew are to navigate the ship, and not to receive the lading.—They are the servants of the master, as his sailors; but not as his clerks and general agents.

XII. The responsibility of the master, for the safe custody of the goods, commences from the time of their delivery. He is answerable for any theft, and even for robbery, though his crew should be overpowered, and neither he nor they in fault. The reason of this liability, where there is no fault, is the same with that of the liability of the common land-carriers. The goods are as completely beyond the care, as they are out of the dominion, of the owners. If masters were not liable under such circumstances, it would afford a facility to the greatest frauds and most criminal conspiracies. On the other hand, the case in which masters may innocently suffer are necessarily very few, and the profits of carriers may be presumed to be adequately adapted to the risk. The principle, therefore, extensive as it is, is productive of a great general good, and in very few cases of any particular evil. We shall point out, in another place, the limitation of the responsibility of ship-owners as settled by several acts of parliament.

Masters responsible for theft or robbery in the port whilst taking in their cargo.

XIII. Another part of the duty of loading is, so to stow and arrange the different articles of which the cargo consists, that they may not be injured by each other, or by the motion or leakage of the ship. In *Sheild v. Davies* (a) the freighter of a ship refused to pay the freight under an allegation that the cargo was spoiled by bad lading. It was an action of assumpsit for the freight of a cargo of butter carried in a general ship, and received by the defendant under the bill of lading. It was offered as evidence, in defence, that the butter had been injured by bad stowage to a degree much beyond the amount of the freight; and it was contended that this was a sufficient answer to the action, as it shewed that no benefit had been derived from the carriage of

Of the stowage of the goods on board the ship.

(a) 4 Campb. 119.

the goods; and, at any rate, it might be given in evidence in mitigation of damages. It was admitted that bad stowage was an injury for which the master was responsible: but it was decided that the freight had been ~~earned~~, and that the damage by stowage must be made the subject of a cross action. Where the freighter covenants to load a *complete* cargo, he is bound to load the vessel according to her capacity, and not according to her register tonnage;—that is to say, he is bound to put on board as complete a cargo as the vessel can carry without injury. (a)

XIV. It is unnecessary to insist further upon the obvious duties of the master under the heads of lading, stowage, &c. They are all comprehended under the general principle, that whatever he is bound to do either by his contract or by the usage of trade, he is likewise bound to do in a sufficient and seaman-like manner; and if he omit or neglect it, or do it ignorantly or unskilfully, he is liable in damages for the consequences of his negligence or ignorance. (b)

Of the commencement and performance of the voyage.

XV. The third main requisite under a charter-party, and therein the third main duty of the master, is the due and sufficient performance of the voyage.

This obligation upon the master is usually expressed in charter-parties by the words, “that the vessel shall, with all convenient speed, sail and proceed to such a port, or so near thereto as she may safely get.” Under these words, it is the manifest duty of the master to use due and reasonable time in the commencement of his voyage; and to sail with the first fair wind, or opportunity, immediately subsequent to the completion of his lading. Where, by the terms of a charter-party, a number of days is appointed for the lading of the cargo, either generally, and without payment on that particular account by the merchant, or by way of demurrage, the master must not sail before the expiration of the time. Upon the conclusion of this time he must sail from port with the first favourable opportunity, and thence proceed to the place of destination without delay; without stopping at any intermediate port, or deviating from the straight and shortest course, unless such stopping or deviation be necessary to repair the ship from the effects of accidents or tempest, or be justified by any sound reason. He may likewise stop or deviate, to avoid enemies or pirates, by whom he has good reason to suspect that he shall be attacked if he proceeds in the ordinary track, and whom he expects to escape by delay or deviation; and he may sail to the places resorted to in long voyages for a supply of water or provisions by common and established usage.

(a) *Hunter v. Fry*, 2 Barn. & Ald. 421.

(b) *Goff v. Clinkard*, cited 1 Wilson, 282.

war, that the vessel shall sail with convoy. In a preceding part of this Treatise, we have had occasion to explain the principle and limits of the duty to sail with convoy. (a) It is now only necessary to add, that if the charter-party superadd any thing to the duties under the convoy act, usually passed during every period of war, the master is bound strictly to abide by such engagement; and he may not only lose his freight, but be liable in the whole value of the cargo, if lost from the consequence of his neglect to sail or keep with convoy. He is also criminally responsible if he wilfully desert his convoy. (b) But the freighter, of course, may dispense with the covenant in which he has bound the master for his own benefit. Thus, in an action against the owner of a ship for a breach of this kind, it was held to be a sufficient defence that the merchant himself was the cause of it. The owner had engaged to sail from the river Douro to London with convoy; and the plaintiff had agreed to load her with 100 pipes of wines. In the morning of the 4th of November, the day appointed for the sailing of the convoy, she had completed her cargo, and was ready for sea, except that a number of pipes of the plaintiff's wine had not been put on board. The captain remonstrated repeatedly with the plaintiff's agents upon the delay: but was not able to get the last wine alongside till mid-day. The other ships belonging to the convoy had before dropped down the river. He immediately followed them, and from that time used every effort to join the Commodore. Had the wind continued, he would have succeeded: but it fell calm, and all his endeavours failed. Lord Ellenborough held, under these circumstances, that the master was excused, the owner himself having caused the injury of which he complained; and, by implication, therefore, having waived the performance of the condition. (c)

XVII. But as a sailing with convoy necessarily affords an additional security to the ship and cargo; and as this condition, therefore, is a main inducement with merchants to send their goods; so a public notice that a ship will sail with convoy, or a bill of lading stating that a ship will so sail, amounts to an undertaking, binding on the owner, that the vessel shall sail according to such notice or bill of lading. (d) And where there is an undertaking to

(a) See *ante*, Part II. chap. 7.

(b) By 45 Geo. 3. See the *King v. Kitts*, 3 Dodson, 57.

(c) *Magalhães v. Busher*, 4 Campb. 54.

(d) *Sanderson v. Busher*, 4 Campb.

n. 54. But where the bill of lading contains no such stipulations, it seems undetermined whether sailing with convoy be any part of the contract. *Abbott*, 644. *Snell v. Marryatt*.

XIX. It is a general rule, that the law will not impose a contract upon a man against his own will and knowledge. Where there is a concurrence of equity and legal liability in favour of an obligation; where a strong equity demands it on the one part, and it is not opposed, on the other, by any incongruity with a principle or maxim of law, the law in all such cases will presume these tacit contracts. This, indeed, is the principle of all implied assumpsits. But the law will not extend this rule so far as to supersede the first principle of all contracts,—that intercourse, knowledge, and consent of the contracting parties, which constitute what is legally termed their *privity*. Hence it will not extend these implied contracts into cases and circumstances where such implication is rebutted by a fact directly contrary; such as by a distinct contract with another, or where there is a total ignorance and non-intercourse of the parties; and where the one had no contract with the other in contemplation. And, therefore, where a master, being in a foreign port, raised the money for repairs upon the sole and exclusive credit of the freighter, it was held that the owner was not liable, as the credit was not given to him. (a) The case was this:—The Margaret had been chartered by her owners, the defendants, to William Sharples, of Liverpool, for a voyage from Newcastle to Copenhagen and Pernau; and from thence to Liverpool, to bring home a cargo of deals and iron on his account, at certain specified rates of freight, which was partly to be paid “by advancing the master of the vessel, for the time being, what money he might require for the vessel’s necessary disbursements at Pernau, free from any commission, at the current exchange.” Upon the arrival of the ship at Pernau, Johns, the master, wanting money for the ship, produced the charter-party to a merchant there, who was the plaintiff in the action. Upon the credit of the charter-party the plaintiff advanced the required money for the ship’s disbursements; and furnished certain stores of which she stood in need, amounting, altogether, to the sum of 304*l.* 19*s.* 11*d.* For this Johns drew a bill of exchange in favour of the plaintiff upon Sharples. The ship was lost upon the homeward voyage, and Sharples refused to accept the bill. Gibbs, C. J. was of opinion, that the defendants were not liable in this action. There was no privity established between them and the plaintiff. He appeared to have advanced

Liability of the owners to pay for repairs is divested by an express and exclusive credit given to another.

Harder v. Brotherstone.

4 Campbell; 254. See likewise *Rocher v. Bush*, 1 Stark. 27.; and *Palmer v. Gooch*, 2 Stark. 428.

(a) *Harder v. Brotherstone*; 4 Campbell. 254. and see this case *ante*, as to another point.

the money on the credit of Sharples. He first sent for the captain, and he was shewn the charter-party before any part of the money was advanced. The captain could not be considered as the agent of the defendants when the money was advanced to him, and there was no implied promise on their part to repay it.

XX. But where the money necessary for repairs cannot otherwise be procured, the master, as we have had occasion to state in a preceding part of this Treatise, may raise it by a sale of part of the cargo; the necessity of the case giving him this right, and the end and object of the voyage (the safe conveyance, if not of the whole cargo, at least of much as is possible,) reasonably allowing it. (a) But, on the return of the vessel, the proceeds of such a sale must be paid to the freighter by the owner, or he may deduct it from the freight; the rule here being, that as the owners have a lien on the cargo for their freight, so the freighter has here a lien on the freight for his cargo. Hence, in an action by a freighter to recover for part of his cargo so sold, the court would not admit the excuse that the freight had been transferred to a third party. (b)

In a case of extreme distress the master may hypothecate the cargo, or sell a part; but he cannot sell the whole, see *ante*, Part II. c. 3.

XXI. It has been before stated, that a case can scarcely occur in which the master will be justified in the sale of the whole cargo; (c) for as the object of the merchant is to procure the safe conveyance of the cargo to the place of destination, it is manifest that such object is injuriously terminated by the total sale of the cargo. But perhaps a better reason for this rule of law may be found in the public expediency of withholding so dangerous a power from the master; and thus rather suffering the smaller evil of the particular hardships resulting from the prohibition, than incurring the danger of the most extensive frauds and mischief which such a power might occasion. Perhaps this restriction of the master has the same foundation with the liability of common carriers for losses by fire, robbing, &c. the preference of the less of two evils; the election of a limited and particular mischief instead of a principle which would afford facility to a general abuse. (d)

Limitation of the authority of the master over the ship and cargo: see *ante*, Part II. c. 3.

XXII. The master is, *de jure*, the agent of the owner of the vessel, who is, therefore, bound by his acts as to all consequences resulting from his conduct of the ship and of the voyage. Thus we have seen, that he may hypothecate the ship and freight when he cannot raise money on the personal credit of the owner; and a case may in reason occur, in which the law would justify his sale of the

(a) See *ante*, Part II. chap. 3.

(b) *Campbell v. Thompson*, 1 Starkie, 490. And see Part II. chap. 3.

(c) See the case of the *Gratitudine*,

3 Rob. 246. and Part II. chap. 2.

(d) See *ante*, Part II. chap. 2. where all the cases are collected.

ship. But he has no such extensive relation to the owner of the cargo; as respects the freighter, he is only a carrier, unless specially constituted an agent or supercargo. (a) Therefore, except in a case of the last necessity, which requires the sacrifice or hypothecation, in part or whole, of the cargo, as well as of the ship, no act of the master can affect the owner of the cargo. (b) In the second part of this Treatise, we had occasion to observe, that the master can, in no event, break up the adventure, and dispose of the *whole* cargo by sale; though, when the distress of the ship is great, and money cannot be obtained for her relief in a foreign port, either upon his own credit, or the credit of his owners (which he must first try, as also the hypothecation of the ship and freight) he may pledge or even sell a part of the cargo, in order to enable him to convey the residue to its destination. It is doubtful, however, whether the master can act to that extent, which, in similar circumstances, but of a less valuable trust, the law would allow to an agent or servant, as being the presumable will of his master under the exigent circumstances of the case. Hence, (c) though, under an extreme case of difficulty or danger, it might reasonably be presumed that the merchant freighter himself, if present, would direct a sale of the whole cargo, it is held to be still doubtful, in the courts of common law, whether the master should be entrusted with a power so open to abuse. (d)

XXIII. It is another part of the duties of masters to take proper care of the cargo during the voyage. As he stipulates in his charter-party against any liability for injuries "by the act of God and the king's enemies, &c." he is not responsible for any injuries arising from the sea or winds, unless, indeed, it be within his power to prevent such damage. Under this principle he is not responsible for injury to the cargo by leakage of the ship, if such ship were tight, staunch, and sea-worthy, at the commencement of the voyage, and has only become leaky by the wear and tear of the voyage, and under the action of the sea and weather. (e) But he is answerable for any other injuries to the cargo within his means of prevention. Hence, if his cargo be corn, and be injured by vermin, he will be responsible for the damage, unless he can prove that he resorted to all practicable means to extirpate them. (f)

Care of the cargo during the voyage.

(a) 1 Rob. 84. 151. 156.

(b) 2 Rob. 251.

(c) *Ante*, Part II. chap. 2. and 3.

(d) We have fully discussed, in another part of this Treatise, the authority of the captain over the ship

and cargo, as to sale, hypothecation, &c. Part II. chap. 3.

(e) See *ante*.

(f) *Dale v. Hall*, 1 Wils. 281. *Davidson v. Gwynne*, 12 East. 381. and *Abb.* 255.

Care of the
cargo during
the voyage.

he is, likewise, responsible for goods stolen or embezzled on board the ship by the crew or other persons, or lost or injured in consequence of the ship sailing in fair weather against a rock or shallow known to expert mariners: (a) In a word, as he is bound to the exercise of all his care, diligence, and professional skill, and as he is guilty of an original breach of duty to the contracting parties, if he have undertaken the voyage without possessing such sufficient skill, he is responsible for all injuries which may arise from negligence or ignorance. So where in a voyage from Hull to Gainsborough a vessel was sunk in the River Trent, by striking against the anchor of another, which anchor lay under water, and without a buoy, whereby some goods in the former were injured, the owners were held responsible for the injury. (b)

Delivery of
the goods.

XXIV. The fourth requisite of the charter-party, and last duty of the master, is the safe delivery of the cargo in the port of its destination, and to the order or assigns of the freighter under the bill of lading.

The covenant of the charter-party, or bill of lading, under which this duty is imposed on the master, is usually expressed in the following terms, or terms of the same substantial import, in the charter-parties now in use:—"And the said master, upon his arrival there, (the outward port,) will address himself to the agents or correspondents of the said freighter; and, as soon after as may be, make a discharge, and a right and true delivery of the said goods and merchandizes, unto the agents, correspondents, or assigns of the said freighter, according to the bills of lading; and so end the said outward voyage."

Under this engagement, the master is bound to take the same care in the due delivery of the cargo as in receiving it on board. Concurrently with the delivery, or previous to it, he has a right to demand the payment of the freight and other charges, such as primage, &c. If the freight be to be paid in money, he should demand money, and it will be at his own risk if he take bills, when money is offered to him. If the freight be to be paid by bills of exchange, he should demand them before delivery; and in most cases he may detain the goods till the stipulated payment be made. If he have any demand for general average, he must conform to the custom of the country and trade in which his charter-party was made,

(a) See this subject of the limitation of the owner's and master's responsibility treated *post*, in the Chapter on Exceptions in the Charter-party.

(b) Proprietors of the Trent and Mersey Navigation, v. Wood, East. Ter. 1785, in K. B. 3 Esp. 127. and Abb. 256. But see chapter on Exceptions in the Charter-party; *post*.

of their respective shares by the merchants concerned. (a)

XXV. As the holders of the bill of lading are presumed to be well informed of the probable period of the vessel's arrival, and as in any event such arrivals are matters of notoriety in all maritime places, it is not the duty of the master to send notice of his arrival to the several assigns of the cargo. In a case to which we have had occasion to refer in a preceding Chapter, (b) the bill of lading contained a stipulation that the goods should be taken out in a certain number of days after the arrival of the vessel, or that the holders should pay for the delay. They were accordingly holden liable for this delay, although they pleaded in excuse that they had no notice of the arrival of the vessel. As the master is not bound to give this notice, it is of no consequence whether the residence of the holders of the bills of lading be known to him or not. But if the means by which the holders of the bills of lading are to obtain this information of the ship's arrival are defective; such as if there be any inaccuracy in the entry of the ship's name at the custom-house, whereby the owner of the goods, notwithstanding proper inquiries for that purpose, should be deprived of the usual mode of being informed of the ship's arrival; it then becomes the duty of the master to apprise them of the ship's coming to port.

No notice of ship's arrival necessary to the consignee of the cargo.

XXVI. Though the master, as we have above said, has a lien on the cargo for the freight, and is not bound to part with the goods till such freight be paid or tendered; yet as much inconvenience would arise from detaining them on board ship, where the assigns of the bills of lading could not examine them, the custom of merchants, and therefore the law, is, that the master should land the goods in some public dock or wharf, and there give them in custody to the dock-keeper or wharfinger, with an order not to part with them till the payment of the freight and other charges. Such wharfinger or dock-company then become the agents of the master, and are responsible if they part with the goods without the freight; the lien being continued in the master through the custody and possession of the wharfinger as his agent.

Landing the cargo.

XXVII. The acts of parliament for the regulation of the several dock companies contain a provision for this right of ship-owners, and this convenience of merchants. Thus, in the 44 Geo. 3. c. 100., by which the London Dock Company is established and

Of the London and West India Dock acts.

(a) *Soldatgreen v. Flight and Another*, Guildhall Sit. p. T. T. 1796, before Lord Kenyon, G. J. cited by

Abbot, p. 258.

(b) Chap. 1. Part III. *Hafins v. Clarke*, 4 Campb. 159.

regulated, it is enacted, that if goods, brought into the company's dock to be landed, are not duly entered with the customs and excise within *seven* days after the ship is reported at the custom-house, the officers of the company may cause the goods to be landed and warehoused under the joint locks of the officers of the customs and excise; and that if the duties are not paid within thirty days after the report of the ship, the commissioners of the customs, or proper officer of the excise, may sell them to satisfy the duties, rendering the overplus to the proprietor or consignee. And, by a subsequent statute (45 Geo. 3. c. 58. sec. 16.) it is provided, that goods so landed and warehoused shall be subject to the same lien for freight in favour of the master and owners, as while they remained on ship-board; and the company is authorized and required, upon notice given by the master or owners, to detain the goods until the freight shall be paid or satisfied, together with the rates and charges to which the same shall have become liable. And the lien of the captain continues on goods impounded in the West India Docks, though he have not given the company notice to retain for his claim. (a) The reason seems to be this:—The 39 Geo. 3. c. 69. sec. 87. imposes a necessity on West India ships to land their cargoes at the West India Docks; and the 45 Geo. 3. c. 69. sec. 15. continues the master's lien for freight after the goods are out of his possession. The clause, however, is general, and not narrowed, either by its context, or reasonable intendment, to the particular case where notice is given; which is only to aid the party in enforcing such lien. Independently, however, of this construction, it seems a manifest principle of equity, that when goods are taken out of the hands of a party by operation of law, he shall never be prejudiced by it, but that the law will retain his lien for him. If goods on board of ship are taken out of the ship *invitum*, and by compulsion of law, the lien will be preserved in the *place*, and in the *hands*, where the law has deposited them. It is another question where the captain voluntarily gives up the goods, in which case he abandons his lien, and looks to the personal credit of the freighter.

XXVIII. The nature and principles of freight, and of its different kinds, of the mode of obtaining payment, of the lien for it, &c. will more properly fall under a future Chapter, in which we shall separately treat that subject. The numerous cases which

(a) Wilson v. Kymer, 1 M. and S. 157. For the general construction of charter-parties, and of covenants

therein, whether precedent, subsequent, or independent, see *ante*, Chap. I. *passim*.

have arisen upon demurrage have already been cited and discussed. (a) It is sufficient here to observe, that the master has no lien on the cargo beyond the freight specified in the bill of lading. Therefore, in a case where a master had received a cargo abroad, and signed a bill of lading for a less amount than what the ship had been let for under a charter-party at home, it was holden that the ship-owner had no lien on the cargo beyond the freight expressed in the bill of lading; nor has he any lien for port-charges. (b) In the above case, a merchant abroad, having a just apprehension of the insolvency of his correspondent at home, who had chartered the ship, purchased a homeward cargo on his account: but, for his own security, took a bill of lading from the captain, expressing, in the first place, a less sum for freight than under the original charter-party; and, secondly, that the cargo should not be delivered to the charterer of the ship without payment being made for the same to a person mentioned in the bill. Under these circumstances Lord Ellenborough held, that the ship-owner had no right to detain the cargo for more than the freight mentioned in the bill of lading; and that the charterer not having made the payment conditioned, had no right to the goods, but that they were rightly delivered to the assigns of the foreign merchant mentioned in the bill of lading.

The master is bound by the bill of lading under which he receives the cargo.

XXIX. The baggage of a passenger may be detained for his passage money. It is, indeed, scarcely necessary to say more upon this subject than that masters are in the analogy of common carriers, and have all the rights of that relation. They can detain the baggage, but not the person.

XXX. The mode of delivery, like that of loading, must be regulated by the practice of the place. It should seem, however, that a hoyman, known to use a particular wharf, is not discharged by delivering goods to the wharfinger, but continues to be liable until they are delivered to the party to whom they are directed. (c) It is, indeed, a general rule, that the master's responsibility continues till the goods are delivered to the consignee according to the ordinary usage of the trade, or the custom of the voyage; that is, either to his wharfinger or his servants, either in boats or on land. But if the consignee shall demand to have the cargo delivered over the vessel's side, and not landed on the wharf, the mas-

Of the delivery of the goods.

(a) See *ante*.

(b) *Mitchell v. Scaife*, 4 Campb. 298. See also *Faith v. East India Company*, 4 Barn. and Ald. 630.

(c) 2 Esp. N. P. C. 693. Abb. 260.

Wardell v. Mourellyan. See, too, *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389.

ter is bound to compliance, a wharf being only a private right, and the wharfinger having no right to compel the public to make use of it. (a) But in *Hyde v. The Trent and Mersey Navigation Company*, (b) Lord Kenyon held, that with respect to ships bringing goods from foreign countries to merchants at home, the owners sufficiently discharged their duty by landing them at the usual wharf. If the cargo be discharged into lighters, the duty of a master is regulated by the custom of the port or river, and he is to watch and guard them till they be safely laden. (c) But if the custom of the port, or the known and notorious usage of any particular branch of trade, require the consignee to unload, or superintend the unloading, in his own person, or by his servants, the master is of course discharged, or is only answerable for that portion of the duty which belongs to him. (d)

Of actions for
the loss or non-
delivery of the
cargo, or injury
done to it. By
whom main-
tainable.

XXXI. As it is the undertaking of the master to deliver the cargo to the consignee, and as it is mostly conveyed at his risk, it follows, as a consequence, that the property of goods, shipped by order, and for the account of the consignee, vests immediately in him; and he *alone* can sue for any injury which takes place after they are on board, or maintain an action for a conversion or a loss. (e) The same rule applies, though the consignee be resident in a foreign country; for a court of law will recognise, generally, no property but that recognised by the bill of lading. Therefore, the delivery of goods to a stranger, fraudulently representing himself to be the person entitled to receive them, would be a conversion, notwithstanding the master should have acted with the best intentions, (f) and the consignee might maintain trover against him. It is otherwise where the master loses the goods, in which case the action must be special; and an action against the master or owners, for not delivering the goods, may be brought in the name of the consignor; for in this case the property of the goods is collateral only to the right of action; and though the title be vested in the consignee, there is a breach of obligation, by non-delivery, to the consignor. (g) So also, where by a bill of lading the captain was to

(a) *Sneyds v. Hay*, 4 T. R. K. B. 200.

(b) 5 T. R. 327.

(c) *Catley and Another v. Wintringham*, Peake's N. P. C. 180. *Robinson v. Turpin and Another*, Guild. Sit. after T. T. 1805, before Lord Ellenborough, C. J.

(d) *Dunnage v. Jolliffe*, before Lord Kenyon, C. J. at Guild. Sitting after

Mich. Term. 1790.

(e) *Brown v. Hodgson*, 2 Camp. 36. *Dawes v. Peck*, 8 T. R. 230. *Dutton v. Solomonson*, 3 B. and P. 582.

(f) *Youl v. Harbottle*, Peake 49. and *Sneyds v. Hay*, 4 T. R. 200.

(g) *Davis v. James*, 5 Burr. 2080.

deliver the goods for the consignor, and in the consignor's name, to the consignee, but the consignee had no property in the goods at the time of shipment, it has been decided that an action against the ship-owners for damage done to the goods must be brought in the name of the consignor ; although the consignee had insured the goods and advanced the premiums of insurance before the arrival of the goods. (a) This distinction was taken in the case of *Evans v. Marlett*. (b) If goods by bill of lading are consigned to A., A. is the owner, and must bring the action against the master of the ship if they be lost. But if the bill of lading be special, to deliver to A. for the use of B., B. ought to bring the action. In other words, the right of action follows the right of property.

(a) *Sargent v. Morris*, 3 Barn. and Ald. 277.

(b) 1 Lord Raym. 271.

CHAPTER IV.

EXCEPTIONS IN THE CHARTER-PARTY, AND LIMITATION OF THE LIABILITY OF MASTERS AND OWNERS BY ACTS OF PARLIAMENT.

IN the former Chapter we have considered the positive and implied covenants of the charter-party and bill of lading. The subject of the present Chapter will be the exceptions which are expressed or implied with respect to the performance of those covenants: the extent in which they are to be interpreted; and the circumstances which either limit or discharge them altogether. The former Chapter explained the liabilities and duties of the masters and owners under the charter-party;—the present, treats of the circumstances which excuse the masters and owners for a nonperformance of the contract upon their parts.

Limit to the
common law
liability of
ship-owners by
7 Geo. 2. c. 15.
and stat. 26
Geo. 3. c. 86.

I. It has been before stated, that common carriers, and ship-owners, as such, are liable for all accidents and losses, not proceeding from the "act of God or the King's enemies." Under the ordinary relation of an agent or servant for hire, a carrier would be liable in all cases of negligence; whether such negligence were immediate, and therein the next and proximate cause of the damage; or whether it were remote, and therein only the cause of that by which the damage was occasioned. But as carriers are necessarily trusted by the owners with the dominion and custody of their property, and as great opportunities would be thus afforded for frauds under the pretext of accidents, the law, for the sake of public security, has deemed it necessary to regard carriers as placed in the additional relation of insurers; and, under that character, to extend their responsibility to all accidents and losses whatever, excepting only such as arise from the act of God and the King's enemies. Under this obligation, therefore, carriers are, by common law, liable for fire, theft, and all other accidents, whether of fault or of mere calamity; the

question not being whether the damage was occasioned by their fault; but whether it be not one of that description for which the law, and, therefore, the contract made under it, have rendered them liable.

Of the limitation of the ship-owners' responsibility, by act of parliament.

II. By the wisdom, as well as the humanity, of the Legislature, ship-owners have been relieved from this common law liability in several instances. The Legislature, in thus limiting their responsibility, has proceeded upon the same policy which dictated the navigation acts; commercial convenience and public good; to encourage the vesting of property in shipping, by restricting the responsibility of ship-owners to the amount of their capital embarked; and to assimilate the law of England to that which had long been the law of other commercial countries; namely, that the owners, when not personally in fault, should be discharged from responsibility for damage occasioned by the master or crew, on relinquishing the ship and freight.

III. The first exception in favour of ship-owners, and in diminution of their common law liability, was given by 7 Geo. 2. c. 15. This statute was passed at the earnest solicitation of the ship-owners and merchants of London, who had taken alarm at some recent decisions in the courts, that ship owners were answerable for the entire and absolute value of the merchandize embezzled by the crew, or master. In order to remove this alarm, and to prevent any discouragement to the embarking of capital in shipping and navigation, the act in question was passed. By this statute the responsibility of owners for any goods "embezzled or made away with" by the master or mariners, or for any malversation whatever of master or mariners, is limited to the value of ship and freight, as being the natural and peculiar fund of the ship-owner, out of which reparation ought to be made. But the master or mariners themselves, in any case of misfeasance affecting them, continue liable, as before the act, for the whole amount of the damage suffered; the statute extending to the relief of the owners alone, and being passed for their relief *only*, in the case of goods embezzled or made away with by their servants. The next act, in like diminution of the liability of owners, is the 26 Geo. 3. c. 86.

Limitation of the ship-owners' responsibility by 7 Geo. 2. c. 15.

IV. By the first section of 26 Geo. 3., no person who is owner of any ship or vessel shall be liable to answer, or make good, any loss or damage, by reason of any robbery, embezzlement, secreting, or making away with, of any gold, silver, &c., or other goods and merchandise, which shall be shipped on board any ship or vessel, or for any act, forfeiture, or damage, done or incurred,

Limitation of the responsibility of ship-owners by 26 Geo. 3. in cases of robberies not by the crew.

without the knowledge of such owner, further than the value of the ship, &c., and freight due, and to grow due for the voyage, wherein such robbery, embezzlement, &c. shall be made, although the master or mariners shall not be concerned in, or privy to, such robbery, embezzlement, &c. (a)

Not answerable
for loss by fire.

It is further enacted, in the same statute, "that no owner or owners of any ship or vessel shall be subject, or liable to answer for, or make good, to any one or more person or persons, any loss or damage, which may happen to any goods or merchandise whatsoever, which, from and after the first day of September, 1786, shall be shipped, taken in, or put on board, any such ship or vessel, by reason or means of any fire happening to, or on board, the said ship or vessel."

The same common law liability limited by the same act in case of the loss of gold, silver, &c.

V. Another section of the same act relieves the master and ship-owners from a liability to make good any loss of gold, silver, jewellery, money, diamonds, and watches, of which the shippers shall not have declared the value at the time of shipping. "No master, owner, or owners, of any ship or vessel, shall be subject, or liable to answer for, or make good, to any one or more person or persons, any loss or damage which may happen to any gold, silver, diamonds, watches, jewels, or precious stones, which from and after the passing of this act shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare, in writing to the master, owner, or owners, of such ship or vessel, the true nature, quality, and value, of such gold, silver, diamonds, watches, jewels, or precious stones."

VI. Another section of this statute likewise enacts, that if the several freighters or proprietors of any gold, silver, &c.; or of any other goods or merchandise, should suffer loss or damage by any of the means aforesaid, in the same voyage, (fire only excepted) and the value of the ship or vessel, with the appurtenances, and the amount of her freight, should not be sufficient to make full compensation "to all and every of them," then such freighters or proprietors shall receive their satisfaction in average, and in proportion to their respective losses. And in order to effect this purpose, a remedy is pointed out to freighters and owners, by

(a) This clause, and indeed the act altogether, was passed, in consequence of the decision of K. B. in *Sutton v. Mitchell*, 1 T. R. p. 18., that the

Geo. 2. c. 15. did not comprehend robberies not by the crew. See Abbott, p. 266.

filing a bill in equity, to which an affidavit must be annexed. It is further provided, that nothing in this act shall discharge the common law remedy against masters and mariners, for "embezzlement, fraud, abuse, or malversation in such masters and mariners respectively."

VII. The pilotage act (a) contains a further exception to the liability of ship-owners, by relieving them from responsibility for any loss or damage occasioned by the neglect or incapacity of any pilot, who may be taken on board in pursuance of the provisions of that act.

Masters and ship-owners not liable for loss by incapacity of pilots.

VIII. The last act diminishing the liability of ship-owners is the 53 Geo. 3. c. 159. This statute was passed to amend the 7 Geo. 2. c. 15., and the 26 Geo. 3. c. 86.; and to give a further relief to owners, in certain cases, and more especially, for the acts of their servants. The several provisions of this statute enact, in substance, 1. That owners and *part-owners* of ships shall not be liable to make good any loss or damage to any goods or merchandize laden on board their ships, beyond the value of the vessel and freight, provided such damage should be occasioned without their fault or privity. The intent of this first clause was to give a protection to *part-owners* as well as to owners. The term *part-owners* is omitted in the preceding statutes, and introduced, for the first time, in the present; and it seems to have been the object of the Legislature, by the first clause, to explain the words "owner or owners," used in the two previous acts, and to give a protection to *part-owners*, which might not, *perhaps*, have been extended to them under the general words, *owner or owners*, in the 7 Geo. 2. and 26 Geo. 3. 2. By the next section there is a legislative exposition of what is to be considered as freight, which the previous statutes had left in general terms. The value of the carriage of goods and merchandize, though *belonging to owners and part-owners*, is to be considered within the meaning of the term freight; and also the *hire* of the vessel due, or to grow due, by virtue of any contract, whether on behalf of his Majesty, or of any person or persons, or any body politic or corporate. 3. The act then provides for separate losses: but declares that nothing therein contained shall be taken to diminish the responsibility to which any master or mariner may now by law be liable, notwithstanding such master or mariner may be an owner or part-owner, 4. The act next proceeds to except the owners of lighters, barges, boats, &c. employed in inland navigation, and ships and vessels

Protection of owners and *part-owners* by 53Geo. 3. c. 159.

Exposition of this act.

(a) 52 Geo. 3. c. 39. See *ante*, Part II. chapter vi. on Pilots.

Of the limitation of the responsibility of owners by 53 Geo. 3. c. 159.

not duly registered. 5. The act next directs the form of proceeding in cases where the value of the ship, with all her *appurtenances*, and the amount of the freight, are not sufficient to make compensation to all the persons who have suffered loss. The proceedings are to be carried on by bill in equity; and the parties claiming recompence are to be entitled to rateable proportions of the value of the ship, appurtenances, and freight.

Such are the principal clauses of this act; the remaining sections of which relate to the forms of proceeding only.

Wilson v. Dickson.

In a late case upon this statute it has been determined by the Court of King's Bench, that the meaning of the first and fourth sections, taken conjunctively, was,—1. That in an action against several joint defendants, as ship-owners, for damage sustained by the loss of goods laden on board their ships, they were not liable in that character beyond the value of the ship and freight due, and to grow due; although the loss were occasioned by the misconduct of one of the defendants, who was both *master* and part-owner. 2. That the value of the ship was to be calculated at the time of the loss, and not at the time of the commencement of the voyage. 3. That in calculating the value of freight due, or to grow due, the money actually paid in advance was to be included. (a)

Of the meaning of the term ship's *appurtenances*, in the 53 Geo. 3. c. 159.

IX. Subsequent to the case of *Wilson v. Dixon*, another important question has arisen upon the construction of the 53 Geo. 3. c. 159. There is undoubtedly some ambiguity in this act. The first section limits the responsibility of owners to the value of the ship and freight. The second section contains an exposition of what shall be considered freight, within the meaning of this act. The seventh section, in addition to the terms "ship and freight," within the limits of which the responsibility of the owners is apparently confined by the previous sections, introduces, for the first time, the word "*appurtenances*," which is afterwards continued throughout the act, as an adjunct to the terms ship or vessel. It would seem, therefore, as if the word *appurtenances* had been accidentally omitted in the first section. Some difficulty has arisen upon the construction which ought to be put upon the word *appurtenances*, and a question is now depending in the Court of King's Bench, in an action of prohibition, whether the fishing stores of a vessel employed in the Greenland trade are to be considered as

(a) *Wilson v. Dickson*, 2 B. and A. p. 2. The Reader is referred to the masterly exposition of this statute in

the judgment of Mr. Justice Bayley, p. 10.

appurtenant to the ship. (a) The Court of Admiralty has decided this question in the affirmative under the following circumstances:

X. In the month of March, 1820, the ship *Dundee*, of about 350 tons' measurement, of which the plaintiff was sole owner, was going down the River Thames on a voyage to the Greenland fisheries for catching whales, and was furnished with the usual apparatus for that purpose. On the ninth day of the same month she came in collision with the defendant's smack, the *Princess Charlotte*, near the Gun Fleet Sand: the smack immediately sunk; and with her cargo, &c. was wholly lost. The defendants immediately instituted a suit in the Admiralty Instance Court, against the *Dundee*, "her tackle, apparel, and furniture." The warrant for arresting the ship was in the same form; and the *Dundee* was arrested under that warrant, at Harwich, a few days afterwards. The *Dundee*, like all other fishing ships, whether for the Greenland or the Southern fisheries, was equipped, not only with a complete supply of all those sailing stores which are necessary for all sorts of ships for the purpose of navigation, such as sails, provisions, boats, &c.; but also with the apparatus necessary and accustomed for the fisheries, such as harpoons, lines, knives, &c. for catching whales, and casks for holding the blubber, and bringing it home to England, where it was to be melted and converted into oil. When the *Dundee* was arrested at Harwich, a dispute arose whether this apparatus for fishing, &c. usually called "fishing stores," came within the act of parliament of the 53 Geo. 3. c. 159., or within the action against "the ship, her tackle, apparel, and furniture;" and, after a good deal of discussion it was agreed, that one separate valuation should be put upon the *Dundee* and her general sailing stores, and another upon her fishing stores; and that bail should be given in the action for the whole amount claimed, reserving the question whether the fishing stores came within the scope either of the act of parliament, or of the action in the Admiralty, it being thought unnecessary at that period to discuss that question, because the plaintiff meant to contest his liability altogether; and if he had succeeded on that head, all further discussion would have been unnecessary. Accordingly the ship and her sailing stores, and the fishing stores, were separately valued, the former at 2095*l.*, the latter at 2236*l.*; and bail was given for 9000*l.*, the full amount of the action. The plaintiff, however, expressly reserved the question, whether he was liable in respect of the fishing

Ship *Dundee*.
Gale v. Lawrie.

(a) *Gale v. Lawrie*, before Abbott, Term, at Guildhall, 1823.
L. C. J., Sittings after Michaelmas

stores, which, he contended, were not within the meaning of the 53 Geo. 3. c. 159. s. 7. as *appurtenances* of the ship. On the 4th December, 1821, Lord Stowell decided, that the plaintiff's ship the Dundee was in fault, and was liable to pay the owners of the Princess Charlotte the amount of her value, freight, &c. The registrar reported a sum of 4544*l.* 12*s.* 6*d.* (independent of the proctor's bill) to be due to the defendants, which sum exceeded the valuation of the Dundee with her sailing stores, (which was only 2685*l.*) but did not amount to the aggregate value of the ship and her fishing stores, namely, 2685*l.* and 2236*l.*, together 4921*l.* The plaintiff objected to pay the amount of this report, upon the ground that it exceeded the amount of the value of the ship and her sailing stores, and that he was liable only to that extent, both under the act of 53 Geo. 3. c. 159. and under the warrant against the ship, her tackle, apparel, and furniture; and this point was distinctly brought before his Lordship on an action of petition. Lord Stowell, however, on the 28th of January, 1823, decided that the fishing apparatus was to be considered as appurtenances of the ship within the seventh section of the 53 Geo. 3. c. 159., and that the form of the action extended to the fishing stores and gave judgment accordingly. In delivering judgment, Lord Stowell observed, "That the question of reparation due in such cases has been differently measured in the maritime laws of different commercial countries; and of the same commercial country (amongst others our own) at different periods. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship, upon the common principle applying to persons undertaking the conveyance of goods, that they were answerable for the conduct of the persons whom they employed, and of whom the other parties, who suffered damage, knew nothing, and over whom they had no controul. To this rule our own country conformed; and it is not to be denied that the term *compensation* is not very accurately applied to any restitution that falls short of a fair and full indemnification for the injury done. But Holland having introduced a law for the protection of her navigation, that persons interested in it should not be liable beyond the value of that property of their own which they exposed to hazard, their ship, freight, apparel, and furniture, England followed in successive statutes, by which it protected owners from responsibility beyond those interests, in the case of embezzlements committed, first, by some of the crew of the ship herself; and in a succeeding statute (26 Geo. 3.) extended to the case of embezzlements committed by other persons. It proceeded in a later statute to give

Lord Stowell's
judgment in
the case of the
Dundee. MSS.

the same protection in the case of all losses otherwise produced. That statute, in the first enacting clause, subjects the *ship, tackle, apparel, and furniture*, and its *freight*: but in the following clauses (7th and 8th) the word *appurtenances* is repeated as subject to contribution. These latter clauses must be considered as explanatory of the first clause, proving that the purport of that clause, though briefly expressed in its own terms, was to embrace whatever could be fairly considered as the *appurtenances* of the ship. It cannot be supposed that these following clauses introduce an inoperative word totally without meaning; and they can have no meaning unless they are understood to be virtually incorporated in the first clause, and to derive an operation from it. If not so, they are either totally unmeaning, or they must stand in direct contradiction to the enacting clause, if that clause confines its own intended meaning to the ship and freight *only*; and these other clauses carry it to *other* subjects. The word cannot be considered with any propriety as the intrusion of a new, distinct, and distant subject. A cargo cannot be considered as appurtenances of the ship, being that which is intended to be disposed of at the foreign port for money, or money's worth vested in a return cargo. Its connection with the ship is merely transitory, and it bears a distinct character of its own. But those accompaniments that are essential to a ship in its present occupation, not being cargo, but totally different from cargo, though they are not direct constituents of the ship; (if indeed they were, they would not be appurtenances; for the very nature of an appurtenance is, that it is one thing which belongs to another thing;) yet if they are indispensable instruments, without which the ship cannot execute its mission, and perform its functions; it may, in ordinary loose application, be included under the term *ship*, being that which may be essential to it, and as essential to it as any part of its own immediate machinery. The appurtenances here particularly charged as liable to contribute are the *fishing stores*, valued by the merchants at Lloyd's at 2236*l.*; the ship being valued at 2685*l.*, and being equipped for a whaling voyage to Davis's Straits. The owners of the ship, charged with the injury, contend that these fishing stores are protected from all liability to contribute; first, by the mode in which the suit commenced by an arrest of the *ship, tackle, apparel, and furniture only*, without including the fishing stores. For it has been argued, that fishing stores cannot be considered as furniture, inasmuch as it has been determined, in a case quoted, that they are not entitled to be so considered. It is a case to be found in two or three reports stated concisely, but more fully in

Ship Dundee.
Gale v. Lawrie.

Object of the
53 Geo. 3. c.
159.

What are to be
deemed appur-
tenances of a
ship, under the
53 Geo. 3. c.
159.

Hodges v.
Bakingstall.

The usage of trade often controls the general construction of the policy; and what shall not be protected as a part of the *ship and furniture* depends, in some cases, on the usage of a particular trade, as where an insurance was made on a Greenland ship; and, in an action on the policy, the question was, whether the fishing tackle was included in the insurance on ship and furniture. Lord Mansfield said, there was no doubt that boats, rigging, and stores belonging to the ship, were included; and as to the fishing stores, it must depend on the usage of trade. Contradictory evidence was given on this. The jury found for the plaintiff: but the court afterwards set aside the verdict, on the ground that the evidence of usage was principally for the defendants. In this case then it was finally decided, and upon the best authority, that, by the *usage of trade*, the meaning of the word *furniture* did *not* include fishing stores in the construction applied to a contract of insurance. I am not sufficiently aware whether this would govern the construction of the same word occurring in an Act of Parliament, or in the phraseology of a court, in which its meaning is perhaps more to be collected from its proper and genuine import, than from a prevailing understanding, controlling its proper meaning, in a contract between two individuals, whose words were not to be carried beyond their own intentions in the contract. But it is unnecessary for me to pursue that question further; because it is an admitted fact, that this mode of initiating a suit by arrest of ship, apparel, and furniture, is the ancient formula of the court, as leading to a full remedy affecting all the property of every kind belonging to the owners. The same formula has existed, and operated its remedy under all the variations by which the remedy has been modified. It has been no further restricted, than as the statutes restricted it. But the initiatory terms, "tackle, apparel, and furniture," founded the suit sufficiently to enable it to embrace all the objects which the statutes left subject to its operation. These restrained them only by their own particular restrictions. The same words went as far as the general law went, notwithstanding the narrowness of those terms; and they must now go as far as the general laws, limited only by that statute, extend. The cause proceeded upon this commencement; and a release of the ship from arrest took place, upon bail given in to answer for the liability of the stores as well as of the ship. I suppose it was an understood matter between the parties; because there was no application to the court, upon any complaint of the oppressiveness of the bail required, and praying the ship might be released without

giving bail for the stores. I think the transaction bears the face of an intention on both sides, that the question concerning the extent of the bail should be finally brought before the court controversially; but that the security now given was to include the *fishing stores*, subject to the final opinion of the court upon their liability. I see no sufficient ground for a charge of ill faith on either side. The whaling ship is anxious to be discharged in prosecution of her voyage; the owner of the Dundee is willing to accommodate, but expects security to be given for the fishing stores in case they are required to contribute. That security is given as conditional; and understood by the party so to be, though not so expressed in terms. But it is to be inferred, I think, from their agreement to have distinct appraisements of the ship, and tackle, apparel, and appurtenances. I do not, therefore, quite understand the ground of that complaint which has been indulged, that the word *appurtenances* was craftily introduced into the agreement about bail, by surprise upon the Dundee. In the first place the bail is taken for no more than for the sum mutually agreed, 9000*l.*, the value of ship and appurtenances. If the appurtenances are liable, the stores are to be so deemed. In the next place, it is quite impossible that the word *appurtenances* should have been introduced by surprise. It is a very short instrument, though important as the great covenant between the parties. It could not have escaped notice. The instrument very naturally states the style of the court in the heading: but the covenanting part introduces the word *appurtenances*, to which, as far as appears, no objection was made, nor any protest given or explanation demanded. It is only *arguendo* that I hear the slightest suggestion. But I must add, that with the sentiments I entertain, and have expressed, upon the statute, the word *appurtenances* is no intruder. It is the statutable word, which, in the latter clause of that statute, reflects back upon the enacting clause, and is fully entitled to share in the force of its obligation. The only remaining question can be, whether the word *appurtenances* is properly applicable to *fishing stores on board a fishing vessel*. It is a word of wider extent than *furniture*, and may be properly applied to many things that could not be so described (with propriety at least) in a contract of insurance. It may not be a simple matter to define what is and what is not an appurtenance of a ship. There are some things that are *universally* so; things which must be appurtenant to every ship, *quæ* ship, be its occupation what it may. But I think it rather gratuitously assumed, that particular things may not become so from their immediate and indispensable con-

Of the meaning of *appurtenances*, as applied to a ship engaged in the fisheries.

Legal meaning
of the act of
God.

as from lightning, earthquakes, hurricanes, plague, and epidemic contagion amongst the crew. (a) For none of these misfortunes are masters or ship-owners responsible. But in order to constitute such an effect from a physical cause the act of God within the understanding of the law, it must be sudden and immediate. And, therefore, where a vessel struck upon a bank of sand, which for many years previous had been sufficiently under water to admit ships to lie by it in safety, but had been raised by a drift of sand into the port or river; it was holden by the court, that an accident which had arisen from this cause was not to be considered within the legal meaning of the act of God. (b) Another ship had previously struck upon the sand-bank above mentioned; and the vessel which was the subject of the action had received the injury in being pierced by the mast of the first vessel, lying under water upon the bank. The court held that such injury was too remote to be regarded as the act of God—the proper interpretation of such act being, some thing sudden and immediate, such as lightning, hurricane, earthquakes, &c.

Legal interpretation of perils of the sea.

XIV. The other terms, “perils and dangers of the seas, and accidents of the seas, rivers, and navigation,” are to be understood of all such accidents as arise from the sea and winds, and which could not be prevented or avoided by any care, vigilance, or skill of the master and mariners; such accidents as are inevitable, and in no degree occasioned by the ignorance, wilfulness, or neglect of the navigators. Thus, a capture by pirates has been held to be within the exception of the perils of the seas. An action was brought upon a charter-party, containing such exception, for not performing the voyage. The defendant pleaded that the ship was taken *upon* the sea by certain warlike persons unknown, whereby he was prevented from completing the voyage. (c)

Pirates a peril of the sea.

(a) *Trent and Mersey Navigation Company v. Wood*, Abbott, p. 249. and *Forward v. Pittard*, 1 T.R. 27.

(b) *Smith v. Sheppard*, Abbott, 263. This case having given great alarm to ship-owners, suggested to them, in order for future protection, an alteration in the bill of lading, which, instead of the usual exception, *perils of the sea*, contains now, in almost all cases, an exception of the act of God, the King's enemies, fire, and *all and every other danger and accidents of the sea, rivers, and navigations, of*

whatever nature and kind. But the best and most comprehensive form is, “all and every other unavoidable dangers and accidents of *whatever nature and kind*, excepted.” This, in the case of *unavoidable accident*, excludes the discussion as to the nature of the accident, that is, whether it be *properly*, an accident of the sea, river, or navigation.

(c) *Pickering v. Berkeley*, Sty. 132. 2 Roll. Abr. 248. S. C. *Barton v. Wolliford*, Comb. 36. and *Morse v. Sluc*, 1 Vent. 190.

and that no violence or threats were used to induce them so to do. He fired two guns at the strange sail, and brought her to, when she appeared to be a neutral;—and he then returned to his moorings. Being examined as a witness, he said he considered himself bound to obey the orders of the captain of the ship of war: but he did not make any protest upon the occasion. It was contended for the plaintiff that the deviation was excused by the control exercised over the master. He did not expostulate, because his expostulations would have been unavailing. The captain of the ship of war had ample means of enforcing his orders. If this were held to be a fault, the consequence would be, that masters of merchantmen would constantly resist the commands of the King's officers. But Lord Ellenborough was of opinion that it was an unexcused act; for that there was neither duty nor duress, neither a moral nor physical compulsion. If a degree of force had been exercised towards the captain, which either physically he could not resist, or, morally as a good subject, he ought not to have resisted, the deviation would be justified. (a)

XX. Previously to the case of *Smith v. Shepherd*, mentioned before, the usual clause of exception in charter parties and bills of lading was, "the act of God and the King's enemies, and the perils of the sea." After the decision of that case, the exception was enlarged into the more ample terms, "all accidents of the seas, rivers, and navigation, &c." But as this precautionary notice is in direct derogation of the liability imposed upon the ship-owners by the common law, the courts will not give it a larger interpretation than the force of the terms necessarily requires. Where the law has imposed a certain duty, and a certain degree and kind of responsibility upon certain functions, for reasons of public convenience, a diminution of this responsibility is a manifest opposition to the reason and purpose of the law; and it would seem upon principle, that the law should neither permit it; or, at least, should restrain such private limitations within the narrowest terms. The law, indeed, always acts upon this principle in the interpretation of the precautionary notices of common carriers, and thus confines the operation of such restrictions within circumstances in which there is a strong equity for admitting it. The courts will certainly apply the same strict mode of interpretation to the new clause in charter-parties and bills of lading whenever any cases shall arise immediately upon it. It is not, however, to be doubted that masters and owners have greatly pre-

(a) See likewise *Borqer v. Christie*, 11 East 266.

CHAPTER V.

OF PRIMAGE, PRIVILEGE, AVERAGE, AND PASSENGERS.

Signification
of the terms
primage, &c.

It is a usual stipulation in charter-parties and bills of lading, that the delivery of the goods shall be made on the payment of freight with *primage* and *average* accustomed. The word "*primage*" signifies a small payment to the master for his care and trouble with respect to the goods, which he is to receive to his own use, unless he has otherwise agreed with his owners. This payment appears to be of very ancient date, and is variously regulated in different voyages and trades. It is sometimes called the master's *hat-money*. By the word *average* is signified several petty charges, which are to be borne partly by the ship, and partly by the cargo, such as the expense of towing, beaconage, &c. Primage and average are often commuted for a specific sum, or a certain per centage on the freight.

Privilege regulated by the
custom of
trade.

I. Privilege is an allowance to the master of the same general nature with primage; being a compensation, or rather a gratuity, customary in certain trades; and which the law assumes to be a fair and equitable allowance, because the contract on both sides is made under the knowledge of such usage by the parties. If the existence of such privilege be questioned, the courts will enquire into it by the evidence of merchants. In an action by the owners against the captain of an East India ship, it was contended for the captain, that the stipulation of a sum in lieu of privilege and primage did not exclude him from the use of the cabin, customary in East India ships. (a) By the contract between the parties, he was to receive a certain sum in lieu of privilege and primage: but, under an alleged custom of trade, he had still retained a part of the cabin for himself, and employed it for carrying goods, for which he had received the freight. The owners brought the action for the amount of this freight; and contended that the

(a) *Birch v. Depeyster*, 1 Starkie, 210.

shall sail for any port out of Europe, &c. with more persons on board than one for every five tons' burthen, without special permission of the commissioners of the customs.

twenty-three, no foreign ship or vessel carrying any passenger or passengers shall sail from any port or place in the United Kingdom, to or for any port or place out of *Europe*, and not being within the Streights of *Gibraltar*, with more persons on board, including the master and crew, than one (whether children or adults) for every five tons' burthen of such ship or vessel (unless special permission shall be given for that purpose by the commissioners of his Majesty's customs, under such regulations and conditions as may appear to them expedient), under penalty of fifty pounds for every person exceeding such proportion, to be paid by the master or other person having or taking the charge or command of such ship or vessel.

No British vessel carrying passengers shall sail with a greater number of persons than as aforesaid, without a licence from the commissioners of customs.

Penalty 50*l*. for each person exceeding the proportion.

Restriction as to licence.

Number of persons permitted to be taken on board of vessels laden with goods for exportation to be in proportion of one adult person to every two tons, &c.

Penalty 50*l*.

IV. The next section proceeds to declare, that no *British* ship or vessel carrying any passenger or passengers shall sail from any port or place in the United Kingdom, to or for any port or place out of *Europe*, and not being within the Streights of *Gibraltar*, with more persons on board, including the master and crew, than one (whether children or adults) for every five tons of her burthen, without a licence under the hands and seals of the commissioners of his Majesty's customs, under the penalty of fifty pounds for every person exceeding such proportion, to be paid by the master or other person having or taking the charge or command of such ship or vessel: provided always, that no such licence shall be granted for any ship or vessel to carry any greater number of persons, including the master and crew, than in the proportion of one adult person (or of two children under fourteen years of age, or of three children under seven years of age,) for every two tons of the burthen of such ship or vessel: provided also, that no such licence shall be granted for any ship or vessel which shall not have two decks, nor unless the height between such decks shall be five feet six inches at least.

V. It is moreover declared to be unlawful for the master or other person having or taking the charge or command of any *British* or foreign ship or vessel, laden with goods and merchandize for exportation, which shall sail from any port or place in the United Kingdom to or for any port or place out of *Europe*, and not being within the Streights of *Gibraltar*, to receive or take on board a greater number of persons, including the master and crew, than in the proportion of one adult person, or of two children under fourteen years of age, or of three children under seven years of age, for every two tons of such merchant ship or vessel remaining unladen with goods and merchandize, under the penalty of fifty pounds, to be paid by the master or other person

and arrived safely at Maranham, upon which the freighter, in pursuance of the above covenant, paid sums amounting to 292l. 9s. 10d. Upon her return homewards the ship was lost; and the freighter brought this action to recover the sum advanced, as the voyage was not performed. Lord Ellenborough, in giving judgment (upon a case from *Nisi Prius*) said, "By the policy of the law of England, freight and wages, strictly so called, do not become due until the voyage has been performed. But it is competent to the parties to a charter-party to covenant, by express stipulations, in such manner as to controul the general operation of law. The question in this case is, whether the parties have not so covenanted by the stipulations of this charter-party. If the charter-party be silent, the law will demand a performance of the voyage; for no freight can be due until the voyage shall be completed. But if the parties have chosen to stipulate by express words, or by words not express, but sufficiently intelligible to that end, that a part of the freight (*using the word freight*) shall be paid by anticipation, which should not depend upon the performance of the voyage,—may they not so stipulate? His Lordship then proceeded to argue from the words "free of all interest and commission," that such was the intention of the parties in this case, and such the fair construction of the charter-party. He was therefore of opinion, that the advance in this case was *anticipated freight*, properly so called; and that the plaintiff (the freighter) was therefore not entitled to recover his money back. The other judges agreed with this construction upon that particular charter-party.

Mansfield v.
Maitland.

XXXIX. The other part of the principle is illustrated in *Mansfield v. Maitland*. (a) In this case the plaintiff, a merchant, hired a ship by charter-party from one Rattenbury the owner. The terms of the charter-party were, that the ship should proceed from London to Quebec; and there, taking in a cargo of deals, should bring them to Bridgewater: one half of the freight to be paid in cash on the unloading and right delivery of the cargo; the remainder by bill on London at four months' date. *The captain to be supplied with cash for the ship's use.* In pursuance of this last stipulation, the master drew a bill of exchange upon the plaintiff, the freighter, which was duly paid. The ship was lost on her homeward voyage. The ship and all the goods on board, having been insured with the defendant, an underwriter, the plaintiff brought this action to recover the amount of the bill. Lord Chief

Justice Abbott, before whom the case was tried at Nisi Prius, was of opinion that the plaintiff had no insurable interest, and directed a nonsuit. Upon a motion in the King's Bench to set aside this nonsuit, the judges were all of unanimous opinion that the advance made to the master was a mere loan, and not an anticipated payment of freight;—that of course it was a debt from the owner to the plaintiff, and could not therefore be recovered from the underwriter as a part of a loss. Abbott, C. J., in substance said, "This is not freight in advance; not an anticipated payment of freight, but a loan from the merchants (the freighters) to the owners. The owners owe him the money. He has not, therefore, lost it; and therefore has no insurable interest. The question, whether money advanced by the freighter to assist the voyage is anticipated freight or not, depends entirely upon the circumstance how it was intended to be by the parties. As no freight is due unless the voyage be performed, the natural presumption is, that the freighter has no intention to pay any; and does not intend, by any advance which he makes, to render his own condition worse than by law it is. Such is the presumption; and the contrary, if asserted, must be made out by express words. In *De Silvale v. Kendall*, the judgment of the court went upon this circumstance, namely, that the charter-party was studiously framed so as to make the freighter risk the money, and to constitute it a part payment of freight to abide the voyage. There is, however, in this charter-party a total absence of any expression implying, that this money advanced shall be part of the freight. If so, the owner is liable for it to the freighter as for a debt, and the latter has not any insurable interest."

Anticipat
freight.

XL. Money due for passage is of the same nature as freight; and must, therefore, be touched upon in this place. Thus, if a passage be taken in the ordinary way, from one port to another, the money to be paid, or understood to be paid, upon arrival; such passage-money will stand upon the same nature as freight; and will not be recoverable, unless the vessel complete the whole voyage, and arrive safely. But in a case before Gibbs, C. J., (*a*) a passage had been taken on board a ship from London to the West Indies, the passage-money to be paid in London before the commencement of the voyage. The passenger put his baggage on board, in the Thames, intending himself to embark at Portsmouth.

Of passage
money.

(a) *Gibbs v. Simpkin*, 4 Campb. 241. and see *Mulloy v. Backer*, 5 E. R. 316. and *ante*.

nant to pay freight has been made, will be entitled to the freight, and not the vendee. (a) A mortgagee, who does not take possession, is not entitled to freight. (b)

Of the part
entitled to
freight, &c.

XLIV. It is a very customary thing for masters in foreign voyages, particularly in the East Indies, to assign the freight, earnings, and profits of the ship as security for advances. We have before observed that such assignments are not within the provisions of the registry acts, *Mestaer v. Gillespie*; (c) and there is no objection to such contracts, when their purport is to assign freight accruing, or likely to accrue due: but an assignment of this kind cannot extend to all the freight, earnings, and profits of a ship in subsequent voyages, inasmuch as it would lie open to the objection made by the Lord Chancellor in *Speldt v. Lechmere*, that it would for ever separate the ship and her earnings. But an assignment of freight for a homeward voyage, though the ship, at the time, should be upon her outward voyage, and the freight of the homeward voyage, of course, not *in esse*, would be perfectly legal. The distinction is, that the freight, like any other interest which the assignor professes to assign, must have an actual or potential existence at the time of the assignment. Therefore in the case of *Robinson v. Macdonnell*, (d) where the owners of a ship assigned to their brokers, in order to secure advances of money for the outfit of their vessel and other purposes, the profits, freight, and earnings then due, or thereafter to become due, of their ship (which ship afterwards in a voyage to the South Seas obtained a quantity of oil, the produce of whales taken in the voyage) the court held, that this oil did not pass to the brokers by the assignment; for the assignors had no property, actual or potential, in the oil, at the time of the assignment, and the voyage was not then contemplated. Lord Ellenborough, in this case, in substance, said, That to make a grant or assignment of freight valid, the freight, which is the subject of it, must have an existence, actual or probable, at the time of such grant or assignment. It must not be matter of chance *merely*, whether such freight be obtained or not. The assignor must have that which he professes to assign, either actually or potentially, and not in possibility only. "But here," said his Lordship, "at the time of this assignment, the assignor had no property, actual or potential, in this oil; for even the voyage in

Of the assign-
ment of freight

*Robinson v.
Macdonnell.*

The freight
signed must
in existence,
either actual
or potential
at the time
of the assign-
ment

(a) *Speldt v. Bowles*, 10 East. 379.

gagee, *ante*, Part II. c. 1.

(b) *Chinnery v. Blackburne*, 1 H. B.

(c) 11 Ves. 621.

117. n. And see the cases with respect to the obligations of a mort-

(d) 5 M. and S. p. 328.

clusive, and the implied promise is merged in the specialty. (a) If, indeed, there be a promise independently of the charter-party, an action may, in certain circumstances, be sustained, notwithstanding its existence; as in a case before cited. (b) The plaintiffs, having contracted by charter-party, under seal, to let a ship, then in the Thames, to freight for eight months, from the day of her sailing from Gravesend; and that she should sail from the Thames to any British port in the channel, to lade goods and proceed to the West Indies, &c.; afterwards agreed by parol, that the ship should lade in the Thames, and that freight should commence from her entry outwards at the custom-house: the court held the parol contract to be distinct from, and not inconsistent with that by deed, and might be enforced by action of assumpsit.

Of the p
entitled 1
freight, 8

XLVIII. The payment of freight is usually made an express condition of the delivery of the goods in charter-parties and bills of lading, and of course the master has a right to withhold the delivery till the freight be paid; in money, if the contract be for money; or in bills, if bills are to be given in payment of freight. If the master parted with the cargo without the payment of freight, and thus gave up his lien, it was doubted, in some of the earlier cases, whether he might resort back to the merchant charterer. But as a lien is only in the nature of a security, and as the express contract is always with the first employer, there certainly seemed no sufficient grounds for this doubt; and accordingly, in several successive cases, (c) it has been holden, that a lien is only in the nature of a second or accessional remedy, and that the master may always have his action upon the contract against the merchant-charterer or freighter. In *Christy v. Row*, the master had signed a bill of lading by which he agreed to deliver the goods to the consignee or his assigns, he or they paying freight for the same. Under some particular circumstance of the voyage, the master made delivery of the cargo to the consignee, without a demand of the freight. The court held, that this was no discharge to the consignor. The principle of these decisions is, indeed, obvious. It is manifest, from the nature and circumstance of bills of

Of payme
freight.

Christy v. R

(a) *Shack v. Anthony*, 1 M. and S. 571. And see *Skinner v. Stocks*, 4 Barn. and Ald. 437. where one part-owner sued for freight, and was allowed to recover for the joint benefit of all the part-owners.

(b) *White v. Parkin*, 12 East. 512. and *ante*.

(c) *Penrose and Others v. Wilks*, Sitt. after Hil. Term. 1790. *Owenson v. Morse*, 7 T. R. 64. *Tapley v. Martins*, 8 Ter. Rep. in B. R. 451. *Christy v. Row*, 1 Taunt. 300. *Sheppard v. De Bernales*, 13 East. 565. *Everett v. Collins*, 2 Campb. 515. *Marsh v. Pedder*, 4 Campb. 257.

valent only to the common case of leaving a bale or parcel with some friend or correspondent of the sender, either by his direction or in his absence. But if the goods have become the property of the consignee, there, as he reaps the fruit of the service, he shall pay the freight. In accepting the bill of lading, he adopts the contract with the ship-owner. Thus, if the bill of lading express in the ordinary terms that the goods are to be delivered to the freighter or his assigns, he or they paying the freight for the same, and such bill of lading be indorsed to a second person, and thence to a third; such third indorsee, on receiving the goods, will be liable for the freight: for such a bill of lading contains a notice on the face of it, that the payment of freight is the condition of the delivery; and the indorsee having accepted such indorsement, he, of course, has assented upon his part to the contract. He takes the goods with that condition and qualification.

Of the payment
of freight.

XLIX: All the cases proceed upon these distinctions; namely, whether the consignee be the mere agent and instrument of deposit for the consignor; or whether he be himself the claimant and purchaser of the goods, or indorsee under the bill of lading. In *Ward v. Felton* (a) the agent received the goods merely as the friend of the freighter upon the spot; the ship having been stranded, and the agent having previously received a letter from his principal, requesting him, under all circumstances, to do the best for the cargo. The agent received the cargo; and further entered it in his own name in the custom-house; but declared, throughout the proceeding, that he had himself no interest in the cargo, but only acted as agent for another. Under these circumstances the court held he was not liable. But in *Cock v. Taylor*, a leading case upon the liability of consignees for freight, the defendant had received the goods as the third indorsee of a bill of lading in the usual terms, "that the goods were deliverable to the shipper, or his assigns, he or they paying the freight." In this case it was contended, that Taylor, the defendant, was the mere purchaser of the goods from the first consignees; and could not be liable in an action of freight, there being no contract, express or implied, between them and the ship-owners. But Lord Ellenborough held, both upon the trial at Nisi Prius, and afterwards upon the occasion of a rule for a new trial being moved for in the King's Bench, that though there were no original privity of contract between these parties for payment of the freight; yet the taking of the goods from the ship by the purchaser under the bill of lading was evi-

Ward v. Felton.

Cock v. Taylor.

(a) 1 East. 507.

Dock Company, in the names of the defendants, and were afterwards delivered out to their order. On the 14th of July Greaves and Co. stopped payment; and about two months afterwards the defendants, (being considered as personally liable, as having entered the goods under the above circumstances,) were called upon to settle the freight as stipulated in the charter-party. Upon the argument in the King's Bench, the court unanimously held that, under the above circumstances, the owners could not recover the freight of the indorsees; a special and exclusive credit having been given by the owners to Greaves and Co. under the charter-party, and there being manifestly no thought of resorting to the indorsees till the bankruptcy of Greaves and Co. The principle and distinction in this case may be briefly explained; and, upon a little consideration, will become intelligible. The consignee or indorsee can only become liable either by an express or implied contract. But an express contract was not pretended in the above case; and the rule of law is, that the courts will not raise an implied promise in a third party, where there is an express agreement, and more particularly a deed under seal, between the original contractors. In a word, there was no privity of contract,—no understanding on the part of the owners that they gave credit to the indorsees for the freight, nor any knowledge or consent of the indorsees that they received the cargo under this condition. The matter, therefore, stood upon their bare receipt and acceptance of the cargo; and this was not sufficient to raise an implied assumpsit, where the goods, being delivered from a chartered ship, were not delivered under circumstances compelling a presumption upon the receivers that the captain looked to them for the freight; but where, on the other hand, the circumstances were such as to justify the inference, that the freight was either actually paid, or that the goods, being brought in a vessel hired by the shippers, the freight was exclusively to be paid by them.

LI. But where the consignees of a West India cargo delivered the bill of lading to their broker, and received advances upon it, and the broker, upon the arrival of the cargo, had it entered in his own name in the custom-house, and afterward received the goods, it was holden by the Court of King's Bench, that the mere circumstance of his receiving the goods *as broker*, or as having advanced money upon them, would not justify the presumption of an assumpsit that he should pay for the freight; but that, as he had always paid the freight of goods in his usual way of dealing under similar circumstances of receiving them, such habit of dealing was sufficient to support an implied promise to pay the

disposition to favour the right of lien for freight, whether under charter-parties or bills of lading; and have, accordingly, been very reluctant in admitting such doctrine of constructive possession in the freighters even of a whole ship, as under strict rules of law would divest the owner of the right of lien; a right with which no prudent ship-owner will readily part. Upon this principle the courts, in a series of decisions, have taken a distinction between those cases where the *ship itself* is let out, and those where the mere carriage, or *space* of the ship, is let out. (a) In cases of the first kind, the vehicle itself is let. In cases of the latter description, (if we suppose the ship, for the sake of illustration, to be a vehicle for the conveyance of passengers,) the *places* only would be let. In the first cases, therefore, the possession of the ship is clearly parted with, and belongs to the freighter; and in such case there being no possession, actual or presumptive, reserved to the owner, there is no footing or foundation for the right or exercise of lien for freight. But where the capacity or space of the ship is only let out, then the possession remains with the ship-owner; and having an actual possession of the goods, he may, of course, retain them, where necessary, in lien for freight. Nor will it make any difference, in cases of this latter kind, whether the whole space of the ship, or only part, be let; as, to recur to our former illustration, a person may hire all the places of a public stage-coach, as well as any single seat, and still leave the owner in possession of his vehicle. The terms of the charter-party, or the nature of the service, must determine under which of these contracts the ship is let; and the right of lien will follow the nature of the original agreement. But in almost all cases of this kind, the court is disposed, from motives of justice as well as policy, to favour the lien of the owner.

Of lien for freight.

LIII. In *Vallejo v. Wheeler*, (b) which was a question of bar-
 ratry, the Court of King's Bench decided, that where a ship-owner
 demises the hull of the ship to the freighter, he constitutes him
 owner *pro tempore*. In *Frazer v. Marsh*, (c) it was holden under
 the terms of the charter-party, that the hull of the ship was itself
 let to the freighter; and that, therefore, the possession so com-
 pletely passed from the registered owners that they were no longer
 liable for charges and disbursements, as if it were their own vessel.
 In a previous case, (d) where the master of a ship had chartered

Vallejo v. Wheeler.

(a) See *ante*, Chapter on Charter-parties.

Part II. c. 2.

(b) Cowper, 143.

(d) *James v. Jones*, 3 Esp. 27. and *ante*, Part II. c. 2.

(c) 13 East. 236. And see *ante*,

her to certain freighters in the absence of the owners, and the plaintiff in the action sued the owners for a loss occurring during the existence of the charter-party, Lord Kenyon ruled, that the charterers were the owners of the ship *pro illd vice*, and that the owners were exonerated. In another case, before Lord Ellenborough, (a) for the non-delivery of some oats, it being proved that the registered owner, against whom the action was brought, had let her out to freight as a general ship, it was ruled by his Lordship that the owners, under these circumstances, were not liable. It is to be observed, however, in the above cases, that the question of the owner's lien did not arise. The decisions turned upon other considerations, namely, on the liability of the owners to the sub-freighters; upon which we shall observe in another place.

LIV. The principal point of practical importance under this head will be, what is the criterion of the two kinds of letting. To this it may be answered, the possession of the ship by means of the master and crew of the owners, taken together with the terms of the charter-party. Both must be taken jointly, as neither is conclusive by itself: for example, the freighter may not only hire the ship, but hire, as it were, the master and crew with it; although, for the sake of commercial convenience, and in conformity with the usage of ship-owners, such master and seamen may continue to be paid by the owners. Indeed, this is the usual practice, and will be found to be a circumstance in almost all the cases of both kinds of letting. The mode of the letting, therefore, can only be ascertained by the terms of the instrument of charter; and what appears, under all the circumstances, to have been the intention of the parties. The much disputed case of *Hutton v. Bragg* (b) proceeded entirely upon this principle, it being assumed by the court, and conceded by the counsel in that case, that the terms of the charter-party amounted to an absolute and unequivocal letting of the hull of the ship; and, therefore, that the possession had so completely passed from the owner, that the latter had no right to retain the cargo in lien; although, by means of his master and crew, it was within his own manual possession. This case is so peculiar in his circumstances, and is, at the same time, so recent, as to deserve an attentive consideration.

LV. The owner of the ship *Neptune* (c) let her out to a freighter for a voyage from London to the Cape of Good Hope, and thence back to London. The charter-party expressed, that the ship was *let out to freight* for the abovementioned voyage: but that

Hutton v.
Bragg.

(c) *Mackenzie v. Rowe*, 2 Campb. 482, and *ante*.

(b) 2 Marsh 339.

(c) *Hutton v. Bragg*, 2 Mar. 339.

the master should reserve the cabin for his sole use, and for the usual accommodation of his crew and ship-stores; and that the freight should be paid by bills drawn during the voyage, or upon the return of the vessel home. The ship performed the voyage agreed upon: but, upon her arrival in the Thames, several of the bills drawn during the voyage had been dishonoured; and the freighter was in that state of insolvency that the owner resorted to his alleged right of lien as a security for his freight, and accordingly regained possession of seventy pipes of wine. The freighter having become a bankrupt, his assignees brought an action for the wine. It was alleged, on the part of the assignees, as plaintiffs, that the shipment of goods did not create any lien, where the ship was let, as in this case, for the whole voyage. That the ship was entirely under the control of the freighter, and that such a letting was of the same nature as letting a house or hired room, and that of course the sole possession was in the lessee; that the payment for hire was, in fact, rather rent than freight, and that the ship-owner had at no time any possession of the cargo upon which to exercise his lien. And Gibbs, C. J., was of this opinion; and accordingly decided, that under a charter-party so expressed the freighter, and not the owner, had possession of the vessel; and that there was no lien, because no possession.

Of lien for freight.
Hutton v. Bragg.

LVI. About the time that the case of *Hutton v. Bragg* was discussed in the Court of Common Pleas, another case, in which the same principle, to a certain extent, was involved, came before the Court of King's Bench. (a) It was an action for tolls claimed to be due from the defendant, as owner of the ship *Britannia*. It appeared, at the trial, that the defendant had chartered this ship to the commissioners of the transport service on behalf of the Crown; and in the course of her service she had the benefit of the lights, buoys, and beacons, for which the plaintiffs claimed the customary tolls. The question was, whether the defendant, having chartered his ship, was liable to pay any portion of these tolls during the time the vessel was in the service of the Transport Board. The case was turned into a special verdict; and on the part of the defendant it was contended, that the Crown, during the period of this ship's employment under the charter-party, was to be considered as the owner of the ship, and that the defendant was not liable to pay the tolls. The court adopted this construction of the charter-party in delivering judgment. "The

The Master,
&c. of Trinity
House, v.
Clark.

(a) See *ante*, Chapter on Charter-party, and 4 M. and S. 388.

Of lien for freight.

Tate v. Meek.

judgment of the court, said, This and the two other cases dependent on it, stand on a very different ground from *Hutton v. Bragg*. There was no covenant for the delivery of the goods, nor any question on the effect of cross covenants for the delivery of the goods on the one side, and the payment of freight on the other side. Here the ship-owner covenants, that he will deliver the goods agreeably to bills of lading. And the merchant covenants, that the freight and primage shall be paid as follows, namely, 300*l.* : part thereof to be paid in cash, forthwith, on the day the brig should be reported inward, at the Custom-house in the port of London, on her return from the voyage ; and the remainder of the freight and primage to be paid by a good and approved bill or bills, payable in London at two months after date, from the day on which the delivery shall be completed. The ship was duly laden at Bahia ; and bills of lading were signed making the goods deliverable to the freighter or his assignees, they paying freight according to the charter-party. The goods in question remained undelivered at the disposal of the master. The merchants required these goods to be delivered to them without tendering any bill or security. The question is, whether the delivery of the goods, and the payment by a bill, be not concomitant acts, which neither party is obliged to perform without the other being ready to perform the correlative act? We think they are such. If the whole cargo had been one bale of goods, there would have been no doubt : but the difficulty is, that the remainder of the freight is to be paid by bills to bear date from the day of the delivery, and the delivery may take several days. We think the captain might obviate this by landing the cargo in his own name, and tendering a bill for the whole amount dated from that day. We are the more satisfied with this judgment, because it not only meets the justice of the case : but the parties, if dissatisfied with it, have liberty reserved to turn the case into a special verdict.

Payment of freight, either in money or bills of exchange (when so stipulated) and the delivery of the goods charged with freight, are concomitant acts.

Yates v. Railston.

LVIII. In *Yates v. Railston*, (a) the owner of a vessel covenanted by charter-party to *let the vessel on freight*, and to deliver the cargo in good condition ; and the freighters covenanted to pay the freight on delivery of the cargo, part in money, and the remainder by bills at four months. In this case the court also determined in favour of the owner's lien, and that he might detain the cargo until payment of the freight ; the delivery of the cargo and payment of the freight being concomitant acts. Gibbs, C. J. said, that the same observation which had been made in

conformity with the agreement. In all cases, therefore, the terms of the contract must determine whether a lien exist or not. In cases of freight, however, it is peculiarly favoured by the law.

LXVIII. But even as respects freight, if the parties contract for a particular time, or mode of payment, the ship-owner has not a right to detain the goods, or set up a claim of lien, incompatible with the terms of the contract. (a) So, where the owner having a lien on the cargo, until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it: the court held, that such a negotiation amounted to an approval of the bill by him, and that it was a relinquishment of his lien on the goods. (b) But if the owner take bills, which are afterwards dishonoured, and any part of the cargo remain in his possession, he will be entitled to his lien on that part for the unsatisfied freight. (c) If the freight is to be ascertained by weight or numbering, or any other process attending the delivery, the owner has a right to insist that this shall be done; and until it be done fully and effectually, there is no legal delivery of the cargo, so as to exclude the lien for freight, although a part of the cargo shall actually be delivered to the consignee. For where there is no inconsistent contract, a special property remains in the owner, until the freight for the whole cargo is either tendered or paid; or until he has done some act, shewing that he assents to part with the possession of the goods, without receiving the freight. (d)

The delivery of
the goods, and
payment of
freight, are
concurrent
acts.

LXIX. The delivery of goods and the payment of freight, whether by money or bills, are concomitant acts. Where part of the freight is to be paid by money, and the remainder by bills, such bills to bear date from the day of the delivery of the goods, and the delivery occupying several days, a difficulty may arise. Is the delivery to precede the giving of the bills? Or is the delivery of the goods, and the giving of the bills, a contemporaneous act? Many cases have decided that these acts are to be done concurrently; and the master may always obviate any difficulty by landing the cargo in his own name, and tendering a bill for the freight due, dated from that day. If the goods be landed in the legal decks, his lien is protected by act of parliament, and it would

(a) *Chase v. Westmore*, 5 Maul. & Selw. 180. See the valuable judgment of Lord Ellenborough in this case, on the law of lien. See also *Crashaw v. Homfray*, 4 Barn. & Ald. 50.

(b) *Horncastle v. Farren*, 3 Barn. &

Ald. 497.

(c) *Stevenson v. Blakelock*, 1 Maul. & Selw. 535.

(d) *Crashaw v. Eades*, 1 Barn. & Cress. 181.

CHAPTER VII.

OF GENERAL AVERAGE.

Definition of
general average.

GENERAL average may be defined to be, an assessment for a loss, or an expense which the loss creates, towards which both ship and cargo are bound to contribute *pro rata*, because it has been incurred for the general benefit and preservation of the whole. Simple or particular average is, damage incurred *by* or *for* one part of the concern, and which that concern alone must bear.

I. General average, therefore, is founded upon the principle of the equity of the cases to which it is applied. Much is not to be met with in the law books on this subject. It is, however, an obvious principle of natural justice, that where two or more parties are concerned in a common sea-risk, and one of them makes a sacrifice for the general safety, the loss shall be assessed upon all in proportion to the share of each in the venture; and the greater sacrifice of the first shall be compensated by the contribution of the others. It seems totally unnecessary to go to the Rhodian or Roman law for what common sense and common justice must suggest to every one; and, though it be pleasing to learned curiosity to perceive the customs of our own times confirmed by such ancient precedents, we should be satisfied with finding the analogy, without grounding ourselves upon it as the reason. General average, in a word, is the common law and justice of partnership; and, defined according to its nature, is a compensation from the common stock of a sea-venture, in the several proportions of the partners in it, for the special loss or sacrifice made by one or more for the common good. In the case of the *Copenhagen*, Lord Stowell, in delivering his judgment, says:—General average is for a loss incurred, to which the whole concern is bound to contribute *pro rata*, because it was undergone for the general benefit and preservation of the whole. *Simple or particular average* is not a very accurate expression; for it means damage incurred by or for one part of the concern, which that part must

I think this is no objection to the action. The plaintiff, by proceeding at law, takes that difficulty upon himself; and, if he is not prepared to overcome it, he cannot succeed. Nor does the multiplicity of actions which may thus be brought appear a ground on which I can hold that relief must be sought in equity. If there is no valid objection upon principle to a particular action, I know not how I can turn round the plaintiff by saying, that an inconvenient number of similar actions may be commenced. I cannot perceive why the shipper of goods may not maintain an action at law for general average, as well as the owner of the ship. 2. I must see, however, that this is a case in which general average can be claimed; and I am of opinion that it is not. Is there here any thing like a *jactus mercium levandæ navis grutid*? A jettison to lighten the ship is not the only foundation of general average: but it must arise from that, or something analogous. The distinction between general and particular average would otherwise be entirely abolished; and the shippers of goods would be called upon to contribute to losses from which they derive no benefit, and which ought to fall exclusively on the ship-owner. Here the agent of the ship arrests the person of the master, (both being agents of the owner,) who had undertaken to carry the whole cargo safely to its destined port. This is different from the arrest of the captain by a foreign force. Even there I am not aware it has ever been held that the master is so inseparably united to the ship, that to redeem him it is lawful to sell a part of the cargo. The process of the court of justice at Copenhagen was not directed against the ship, and was confined entirely to the person of the master; it was merely an arrest for a personal debt. I was at first struck by what was said about the Sound dues; and, had the ship been seized for non-payment of these, I should have thought the sale of a part of the cargo to pay them, in the absence of all other means to raise money for that purpose, might have been the foundation of a claim for general average. But these dues had been paid to the Danish government by Parker, the ship's agent; and the money so paid merely constituted a private debt due to him, which he sought to recover by process against the person of the master. It comes to this; whether, if the captain be severed from the ship, whatever be the cause, he may sell a part of the cargo to redeem himself? I see no distinction between this arrest for debt, and an arrest for an assault which he might have committed in the streets of Copenhagen. No case has been cited, or principle advanced, to shew that a claim for general average can arise from an act done to redeem the master of a ship from

of the port of delivery, in order that he might take possession of the vessel before her arrival, it was held by the court, that the transit was not at an end; and as the consignor had stopped the goods at the last port of arrival, that the stoppage *in transitu* had effectually taken place. (a)

Stoppage *in transitu*.

XXI. Upon the same principle, any delivery by a carrier under mistake, where the consignor has given timely notice to stop *in transitu*, will not take away the right of stoppage; such delivery being equivalent only to an erroneous delivery to a wrong person. Thus, where a vendor delivered goods to a carrier, to be conveyed to the vendee, but, hearing immediately afterwards of his embarrassed circumstances, gave notice to the carrier not to deliver them: the carrier, however, under some mistake, did deliver them to the vendee, who immediately disposed of part of them, and shortly afterwards became bankrupt. Under these circumstances, the Court held, that such delivery being erroneous, was in fact no delivery; and, therefore, that the vendor was entitled to recover in an action of trover against the assignees. (b)

Of a delivery under mistake.

XXII. Nor is this right divested by an attachment at the suit of a creditor of the vendee, if the attachment be made before the ultimate delivery of the goods; the goods then attached not being the property of the consignee, as opposed at least to the right of the unpaid consignor to stop *in transitu*. (c) And a usage for land-carriers to retain goods as a security for a general balance of accounts due from the consignee will not divest this right of the consignor, upon paying the carriage of the particular goods only. (d) Goods deposited at the King's warehouses, on their arrival, for the duties, under 26 Geo. 3., c. 59. may be stopped *in transitu*, though they have been claimed by the consignee; such place of deposit, and the time during which it continues, being a stage or interval, as it were, of the transit. (e)

XXIII. But an actual removal of the goods from the place of landing or last arrival is not necessary to vest the ultimate possession in the vendee. If he take a constructive possession, such as marking the goods, or exercising any unequivocal act of dominion over them, *bona fide*, it will be sufficient to render the delivery complete, and thereby to divest from the vendor the right of stopping *in transitu*. And therefore, where an attachment for

(a) *Holst v. Pownal and Another*,
1 Esp. N. P. C. 240.

(b) *Litt v. Cowley*, 2 Mars. 457, and
7 Taunt. 169. See also *ante*.

(c) *Smith v. Goss*, 1 Campbell, 282.

(d) *Oppenheim v. Russell*, 3 B. & P.
42.

(e) *Northey and Another v. Field*,
2 Esp. N. P. C. 613.

hands, and buying of one whom he sees to possess the usual *indicia* of property, and the power of selling. (a)

Stoppage *in transitu*.

XXXVI. But these principles, obvious as they may now appear, were admitted very slowly into the practice of the courts. The first occasion of their being considered was a case in equity, decided by Lord Hardwicke;—a decision, said Lord Kenyon, (b) “upon which the doctrine of stopping *in transitu* is bottomed; Lord Hardwicke having established in that case the very wise rule, that the vendor might resume the possession of goods consigned, before delivery, in case of the bankruptcy of the vendee.” This case, however, has sometimes been very strangely adduced, as the origin of, and direct authority for, the effect of an assignment of a bill of lading to divest the right of the unpaid vendor to stop *in transitu*. A correct statement of the circumstances (but which correct statement must be sought in the observations of the Judges, where they had occasion to speak of it, and not in the original reporter,) will shew that it is a direct authority for the contrary.

XXXVII. The facts of the case, thus amended, appear to have been as follow: (c) Snee and another, plaintiffs in the suit, were the assignees of one Tollet, a bankrupt; and the bill was filed by them against Prescott, a partner in the house of Raguénau and Co., the consignors of the goods in question, Dawson, the master of the ship, and Julian and Le Blon, the assignees of the bill of lading. Tollet having consigned some wools to Raguénau and Co., at Leghorn, gave orders to barter them for some Italian goods. Raguénau and Co. accordingly advanced considerable sums in the purchase of silks, which they consigned to Tollet, and shipped at his risk and on his account, at the same time sending him bills of lading. Tollet, upon receiving these bills of lading, assigned them for money advanced, to Julian and Le Blon; and a short time afterwards, and before the arrival of the cargo, became bankrupt. Upon this event Prescott, one of the partners of Raguénau and Co., claimed to stop the delivery *in transitu*, and demanded the goods of the master. Under these circumstances Lord Hardwicke, in his judgment, said, “As the indorsement of the bill of lading by Raguénau and Co. is in blank,

Snee v. Prescott

(a) The Reader will refer back to the Chapter on Bills of Lading; and read it, as incorporated, with the present Chapter.—He will consult also, 4 Geo. 4. c. 83. (which see in the Appendix) as to the new powers given to

a consignee or factor to pledge a cargo.

(b) In Ellis and Hunt, 3 T. R. 467.

(c) Snee v. Prescott, 1 Atk. 245, But see the facts corrected by Buller, in 1 T. R. 73.

and that, by indorsement, the property vested in the assignee. The point, however, at length came directly before the Court, upon its own merits; and received that decision upon which the law of the assignment of bills of lading now stands.

Stoppage *in transitu*.

XXXIX. A mercantile house, (Turing and Co.) had shipped goods at Middleburgh, for Liverpool, by the order of one Freeman, of Rotterdam: and drawn bills of exchange upon him for the price; and taken from the master three bills of lading for delivery of the goods to order or assigns, two of which they indorsed in blank; and transmitted them, together with an invoice, to Freeman, at Rotterdam, who sent them and the invoice to the plaintiffs, at Liverpool, in the same state in which he received them, that they might receive and sell the goods on his account; and drew bills of exchange upon them nearly to the amount. Freeman and the plaintiff accepted the bills of exchange drawn upon them respectively: but, between the ship's departure and her arrival at Liverpool, Freeman became a bankrupt, and absconded; and Turing and Co. sent another of the bills of lading to the defendants, indorsed specially for delivery to them; and they thereupon obtained the goods from the master. Turing and Co. afterwards paid the bills of exchange drawn by them upon Freeman, and the plaintiffs paid those which had been drawn upon them by Freeman. The Court, after solemn argument and deliberation, held, that by an assignment made by the consignee for a valuable consideration, and without notice to the assignee that the goods were not paid for, the property was absolutely transferred to the assignee; and that the consignor was, by such an assignment, deprived of the right to stop the goods *in transitu*, which, as against the original consignee, he might have exercised. From this decision an appeal was made by writ of error to the Judges of the Courts of Common Pleas and Exchequer, (a) who reversed the judgment of the Court of King's Bench; holding that the assignment gave to the assignee no other right or title than that which the consignee himself possessed, and, consequently, that the consignor had a right to stop the goods, and prevent their delivery to the assignee. This judgment was by a second writ of error brought before the House of Lords: but their Lordships, thinking the facts of the case were not laid before them in such a manner as to warrant a decision of the point of law, directed the cause to be tried again by a jury in order to remedy that defect. It was accordingly tried again; and the

Lickbarrow v. Mason.

(a) 1 H. Bl. 537.

wreck and capture. But before we proceed to consider it severally Of Salvage. under each of these divisions, it may be useful to advert to some general principles which belong in common to both.

III. It is first to be observed, that the law never loses sight of the principle, that the state itself has an interest in the maintenance and encouragement of great maritime and mercantile concerns, and that shipping and seamen are necessarily blended with our national defence. Under this feeling, the law of salvage is at once liberal towards salvors; and on the other hand, is vigilant to protect the ship-owner and merchant from exorbitant claims made under the necessity of the case. In order to unite both these purposes, the Legislature has passed several laws for regulating the rewards to be given to salvors; and where the complicate circumstances of the case do not admit of any previous definite sum, the law has appointed arbitrators to apportion the reward according to the equity of the occasion. But as many of these cases may exceed an ordinary degree of difficulty, as they may arise upon the high seas, as well as upon the coast; and as the parties may justly require a tribunal of more knowledge and judgment than a bench of two or more magistrates; the law has very wisely reserved the jurisdiction both of the common law courts, and the Admiralty, in most of the salvage acts. In some cases, indeed, as will be seen in the sequel of this Chapter, the decision of the justices under the act is final: but in others, the jurisdiction of the Admiralty is entire. And if the act interferes with the subject-matter, it is either only to give the parties an option of an easier remedy, or to fix some term (as in the prize acts,) beyond which the Admiralty, in the cases within the acts, must not extend the reward to the captors.

IV. The jurisdiction of the courts of law is more abridged than that of the Admiralty by the several acts of salvage: but it is a principle that this jurisdiction is reserved where it is not expressly taken away. In cases arising on the high seas, that is to say, not so immediately off the coast, that the salvors can be of the description of persons mentioned in the acts of Anne, and George 2. and 3., the determination of salvage almost necessarily belongs to the Court of Admiralty. In all these cases, if the parties cannot agree amongst themselves as to the rate of salvage, the plaintiff must resort to the Court of Admiralty; on which occasion, the most prudent course for the defendants is, to tender, in the first stage of the cause, *by act of court*, and not personally and verbally to the claimants, a specific sum for the salvage, accompanied by an offer to pay the costs incurred. The court will then consider of

service, the promptitude and alacrity of the salvors, the value of the ship and cargo, and the degree of danger from which they have been rescued. (a) Thus, where the distress was great, the value of the property recovered 17,604*l.*, and the salvors numerous, 1,300*l.* was given. (b) In a case of distress, where the service rendered was small, the court deemed 50*l.* to be sufficient. (c) And the court, in a case of salvage, will always make the distribution with the most perfect equity towards all persons concurring actually or *virtually*; and, therefore, where part of a crew went on board a vessel, and performed a meritorious act of salvage, the court held, that those who remained in the ship, being equally ready to go, were entitled to share in the reward for the preservation of the wreck. (d)

Of Salvage.
Equitable rules
in computing
salvage in the
Admiralty
Court,

XIV. In a case of derelict, where the danger was inconsiderable, the court gave two-fifths. The case must be most meritorious to entitle the salvors to a moiety. In another case, where the enemy abandoned a prize ship after capture, the court allowed the recaptors one-sixth, as for recapture of a derelict. (e) In another case, where the service was attended with great danger, the court gave two-thirds of the whole value; a sum greater than the amount for which the claim was first entered. (f) The freight will be included in the value of the property upon which salvage is given in cases only where the voyage has been actually commenced, and the freight is in the course of being earned. (g) If the freight be merely contingent, and not accruing, the salvors are not entitled to a reward from a fund not yet in existence.

XV. Salvage is not limited by the prize acts, where a ship has been voluntarily abandoned by the enemy; and in one case a moiety was given. (h) Where a ship has been rescued from the damages of the sea as well as the hands of the enemy, the court will go beyond the proportion limited by the act of Parliament, and give an additional reward for civil salvage as for a separate service. (i)

Having thus briefly observed upon the rules and principles common to salvage through all its species, and touched upon some leading cases in the courts of Admiralty and common law, we shall now

Of salvage in
case of wreck.

(a) *The Sarah*, 1 Rob. 312.

(f) *Jonge Bastiaan*, Steyling, 5

(b) *William Beckford*, Muirhead,

Rob. 322.

3 Rob. 355.

(g) *Dorothy*, Forster, Sowden, 6

(c) *Vrow Margaretha*, Jacobs, 4

Rob. 88.

Rob. 103.

(h) *Lord Nelson*, Edw. 79.

(d) *Baltimore*, 2 Dod. 132.

(i) *Louisa*, Higginbotham, Dod.

(e) *Fortuna Quest*, 4 Rob. 193.; and

317.

John and Jane, Askew, 4 Rob. 216.

to any of them, by or on the behalf of the chief officer of any vessel belonging to the King's subjects, or others, in danger of being, or actually being, stranded or run on shore, are empowered and required to command the constables of the ports nearest to the coast to call together as many men as shall be necessary to the assistance and for the preservation of the distressed ship and its cargo; and if any other ship belonging to the King or his subjects happens to be riding at anchor near the place of distress, the officers of the customs, and constables, or any of them, are empowered and required to demand of the superior officer of such ship assistance by his boats, and such hands as he can conveniently spare; and if such superior officer refuses or neglects to give such assistance, he forfeits 100*l.*, to be recovered by the superior officer of the ship in distress, with costs of suit, in any court of record. (a)

12 Anne, st. 2.
c. 18.

XIX. And, in order to prevent any hindrance or embarrassment in the manner of rendering such aid, it is enacted in the same act, that the master of such vessel may repel by force, or may arrest and take before any two justices of the peace, all persons who shall enter the ship without leave of the officer of the customs, his deputy, or the constables, or of the captain, or other officer of the ship; and may repel or arrest all such persons as shall molest them in the saving of the vessel or cargo; or shall take out and deface the marks of any bale of goods; and all persons who are admitted to assist the ship shall conform, in the first place, to the orders of the master, or other officers or owners, or the persons employed by them; and for want of their presence and directions, to the orders of the persons authorized to execute these statutes in the following subordination, as they happen to be present, namely, officer of the customs, officers of excise, sheriff or his deputy, justice of the peace, mayor, or chief magistrate of a corporation, coroner, commissioner of the land-tax, chief constable, petty constable, or other peace officer; under the penalty of 5*l.* for wilful disobedience of such orders, to be levied by warrant of a justice. (b)

XX. And, for the due settlement of the compensation to be made as salvage, it is provided, that the officers of the customs, master of any ship, and all others who shall act or be employed in the preservation of ship or goods, shall within *thirty days* be paid a reasonable reward by the master, mariners, or owners of the ship in distress, or the merchant whose ship or goods shall be

(a) 12 Anne, st. 2. c. 19. s. 1.; and
26 Geo. 2. c. 19. s. 9.

(b) 12 Anne, st. 2. c. 18. s. 3.

Commissioners of the land-tax, who, or any live or more of them, are required and empowered to examine persons upon oath, and thereupon adjust the *quantum* of salvage. And if such salvage and expenses be not paid within forty days, the officer of the customs concerned in the salvage may raise the necessary sum by bill of sale upon the ship and cargo, redeemable nevertheless upon payment of the principal borrowed, and interest at four per cent. (a)

XXII. The statute of Anne, as before observed, comprehended the aid given to the ship by the public officers and persons therein mentioned only. It contained no provision for regulating the salvage to be given to persons *voluntarily* assisting. In order to supply this defect the act of Geo. II. enacts, that in case any person or owners not employed by the master, mariners, or owners, or other persons lawfully authorized, in the salvage of any ship or vessel, or the cargo or provision thereof, shall, in the absence of the persons so employed and authorized, save any such ship, vessel, goods, or effects, and cause the same to be carried for the benefit of the owners or proprietors into port, or to any near adjoining custom-house, or other place of safe custody, immediately giving notice thereof to some justice of the peace, magistrate, or custom-house or excise officer, or shall discover to such magistrate or officer, where any such goods or effects are wrongfully bought, sold, or concealed, then *such person or persons shall be entitled to a reasonable reward for such services*, to be paid by the masters or owners of such vessels or goods; and to be adjusted, in case of disagreement about the *quantum*, in like manner as the salvage is to be adjusted and paid, by virtue of a statute made in the 12th of Queen Anne.

26 Geo. 2. c. 19.

The act also declares, that the commissioners of the land-tax, the deputy-sheriff, the coroner, and the officers of excise in each county, shall be the proper officers for putting these acts in execution, together with those persons respectively named in the act of the 12th of Anne. In the cinque ports, however, the execution of these acts is entrusted to the lord warden of the cinque ports, the lieutenant of Dover castle, the deputy warden of the cinque ports, the judge official and commissary of the Court of Admiralty of the cinque ports, two ancient towns, and the members thereof, and to all and every other person and persons appointed, or to be appointed, by the lord warden of the cinque ports.

26 Geo. 2. c. 19.

liament, some provisions were made for the preservation and restoration of cables, packages, and other single articles frequently cast overboard, or otherwise lost or left by ships in distress. By the act for this purpose, it is enacted, (a) that all persons who shall take up any anchors, cables, or goods, that may have been left by any vessel within any harbour, river, or bay, or on any of the coasts, whether the same shall have been in any distress or otherwise, shall send a report in writing of the articles found, and the time and place of finding, to the deputy vice-admiral, or his agent, at or near the port to which they shall first bring the articles, within twenty-four hours after their arrival, or before they leave the place, if they leave it within that time, and deliver them at such place as the vice-admiral of each county shall appoint, for safe custody until the articles are claimed by the owner or his agent, and the salvage and charges are paid or secured; and the deputy vice-admiral or his agent is to send the report, or a copy of it, to the secretary of the corporation of the Trinity House of Deptford, who is to place it in some conspicuous situation for public inspection. This report is to be transmitted within two days, if the articles are of the value of 20*l.*: but it need not be done until the articles deposited amount to that value. The deputy vice-admiral, or his agent, may also seize such articles as have not been reported to him, and is required to keep and report them to the Trinity House, in like manner; and if he seize without previous information, he is to have one-third of the value. If he seize in pursuance of information, the third is to be divided between him and the informer. If the articles are not claimed within a year and a day after the report transmitted, they are to be sold, and the money applied as directed by the act of 12 Anne; and, in case they have been seized, the deputy vice-admiral or his agent, and the informer, (if any) are equally entitled to the salvage, which shall be allowed by the Court of Admiralty to the salvors in the case of unclaimed property. And in case of disagreement as to the amount of salvage, or the value of the articles, they are to be adjusted by two justices residing near the place where the articles are deposited; or, in case the justices differ, they may nominate a third person conversant in maritime affairs.

49 Geo. 3.
c. 122.

48 Geo. 3. c. 130.
49 Geo. 3. c. 122.

(a) 49 Geo. 3. c. 122. s. 1, 2, 3, &c. the first section in the 53d of the King; and continued till July, 1820, and to the end of the session of Parliament then pending.

Both these acts, (the 48 & 49) were enacted at first for only seven years; and would have expired in 1815 and 1816, but were afterwards renewed by

lord of any manor, or other person, who may be entitled to, or claim to be entitled to, wreck of the sea, or to any goods found jetsam, flotsam, or lagan, shall be authorised to appropriate such wreck or goods to his, her, or their own use, or otherwise to dispose thereof, until he, she, or they, shall have caused a report thereof in writing to be given to the deputy vice-admiral of that part of the coast where the same shall have been stranded, wrecked, or found, or to his agent; or if there shall be no such deputy vice-admiral, or agent residing within the distance of fifty miles, then to the corporation of the Trinity House of Deptford; which report shall contain an accurate and particular description of the wreck or goods found, and of the place or places, and time or times where and when the same may have been found, and of any marks that may be thereon, and of such other particulars as may the better enable the owner or owners thereof to recover the same; and also of the place or places where the same are deposited, and may be found and examined by any persons claiming any right to such wreck or goods, nor until the full expiration of one whole year and a day after the delivery of such notice, any thing in any law to the contrary notwithstanding; and the deputy vice-admiral, or agent aforesaid, shall, within *forty-eight* hours after receiving such report as aforesaid, transmit a copy thereof to the secretary of the corporation of the Trinity House of Deptford, upon pain of forfeiting, for any neglect to transmit such account as aforesaid, the sum of fifty pounds to any person who will sue for the same; and the said secretary shall cause such account to be placed in some conspicuous situation for the inspection of all persons claiming to inspect and examine the same; provided always, that nothing herein contained shall extend or be construed to extend to repeal, or in any manner to affect, any of the provisions of an act passed in the last session of parliament, intituled, "An act for charging foreign liquors and tobacco, derelict, jetsam, flotsam, lagan, or wreck, brought or coming into Great Britain, with the duties payable on importation of such liquors and tobacco."

XXX. When any goods which shall be found or taken possession of by any lord of any manor, or person entitled, or claiming to be entitled to, wreck of the sea, or to goods found flotsam, jetsam, or lagan, or his or her agent, or servant, or by any vice-admiral, or his deputy or agent, or by any officer or other person whatsoever, acting by or under the authority of the said recited acts, or of either of them, shall be of so perishable a nature, or so much injured or damaged that the same cannot be kept, then such

tion by the owner or occupier thereof, for the purpose of rendering assistance in saving, recovering, and preserving any such ship, or vessel, or goods, or stores, or any cables, anchors, spars, masts, cordage, or other tackle, or articles belonging to any ship or vessel, or for saving, or otherwise assisting in preserving, the lives of the crew, or of any persons on board of any such ship or vessel, or for the taking possession of, and securing for the benefit of the owners thereof, of any wreck or goods, or other things cast on shore, or found on shore, or found near thereto, provided there shall be no road by which the parties may pass and repass with as much convenience and expedition as over such lands; and also to place any planks, timber, or any part of the wreck, or any goods or stores removed or saved from any such ship or vessel, or any other wreck or goods aforesaid, upon any such land for a reasonable time, until they can be removed to some warehouse or safe place of deposit, making compensation to the occupier of such lands for any damage done by the means aforesaid, which compensation shall be a charge upon the wreck or goods in respect whereof the damage may be done, in like manner as salvage; and in case the parties cannot agree as to the amount thereof, then the same shall be ascertained and settled by two justices of the peace, or of a third person to be named by them, in such manner and within such times as the amount of salvage is directed to be ascertained and settled by the said recited act in the 49th year of his said Majesty's reign.

Of Salvage.

53 Geo. 3. c. 87.

XXXII. It has been before observed, that the operation of the above acts is especially restrained from affecting the privileges of the cinque ports, which are therefore governed by regulations enacted for them in other statutes. The principal of these rules, as respects salvage, are: By an act of Geo. 1. (a) the lord warden is authorised to appoint commissioners, of whom any one may adjust the salvage for cables and anchors. By the statute of Geo. 2. (b) the lord warden of the cinque ports, and the lieutenant of Dover Castle, the deputy warden of the cinque ports, the judge official and commissary of the Court of Admiralty of the cinque ports, two ancient towns, and the members thereof, and all and every of them, and all and every person appointed by the lord warden pursuant to the before-mentioned statute of Geo. 1. are to be the persons appointed to put in execution the several statutes

Regulations of the cinque ports.

(a) Continued by 3 Geo. 1. c. 13. s. 5. The cinque ports are Dover, Sandwich, Romney, Hastings, and Hythe, and the two ancient towns

of Winchelsea and Rye. The limits are defined in 48 Geo. 3. c. 130. s. 20.

(b) 26 Geo. 2. c. 19. s. 10.

resident; and either party may, within twenty-four hours after the award, declare his desire of obtaining the judgment of some competent Court of Admiralty; with respect to the salvage or compensation; in which case the salvors must forthwith declare whether they will proceed in the Admiralty of England, or in the Admiralty of the cinque ports; and must proceed by monition within twenty days from the date of the award; and the commissioners are to permit the ship and cargo to depart on their voyage, or deliver the goods to the owners, taking bail in double the amount of the sum awarded. All anchors, cables, merchandise, and marine stores, found by boatmen and others, are to be delivered at Ramsgate, Deal, or Dover, or such other place of public deposit as shall be declared by the lord warden; and the officers of the lord warden may seize such articles either at sea or on shore. The statutes then reserve the jurisdiction of the Courts of Admiralty: that of the courts of common law is holden to remain in all cases, except where expressly excluded by a provision in the statute. (a)

Of Salvage.

Of the cinque ports.

48 Geo. 3.

Secondly, As to salvage in the case of capture and recapture.

XXXV. By the ancient marine law of England, and before any act of parliament upon the subject, it was holden, that property in ships and cargoes was not so changed by capture as to bar the owner in favour of a vendee, or recaptor, till there had been a sentence of condemnation by a competent court. Upon this principle, judgment was given in the Admiralty Court in a very early case, decreeing restitution of a ship re-taken by a privateer, though she had been fourteen weeks in the enemy's possession. Another case was decided upon the same principle, though the vendee had possessed the property for a long time, and after two preceding sales and many voyages. (b) According to this law, therefore, the *jus postliminii* of the owners continued till the actual condemnation of the ship, which subsequent acts of parliament, now about to be quoted, have extended; so that this right of the owner now continues for ever. By the effect of these statutes, the owner is now entitled to have his ship and goods restored to him, however distant the time of recapture may be from that of the original taking, and whether they were retaken after condemnation or before.

In the case of capture and recapture.

XXXVI. The two first of these statutes are of the reign of George 2. (c) By these acts, taken together, all ships and vessels

(a) 48 Geo. 3. c. 130. sec. 1 to 9. (c) 13 Geo. 2. c. 4. and 29 Geo. 2. inclusive. c. 34.

(b) 2 Burr. 694.

such privateer, or other ship, vessel, or boat, shall be without any deductions, and shall be divided in such manner and proportions as shall have been agreed on by them as aforesaid; and in case such ship, vessel, or goods, shall have been retaken by the joint operation or means of one or more of his Majesty's ships, and one or more private ship or ships, then the judge of the High Court of Admiralty, or other court having cognizance thereof, shall order and adjudge such salvage to be paid to the recaptors, by the owner or owners of such retaken ship, vessel, or goods, as he shall, under the circumstances of the case, deem fit and reasonable; which salvage so to be adjudged shall be accordingly paid by the owners of such retaken ship, vessel, or goods, to the agents of the recaptors, in such proportions as the court shall adjudge: but if such ship or vessel, so retaken, shall appear to have been, after the taking by his Majesty's enemies, by them set forth as a ship or vessel of war, the said ship or vessel shall not be restored to the former owners or proprietors, but shall in all cases, whether retaken by any of his Majesty's ships, or by any privateer, be adjudged lawful prize for the benefit of the captors.

Of Salvage, in the case of capture and recapture.

XXXVIII. The above, therefore, is the law of salvage, with respect to capture and recapture, in a period of hostilities. We shall proceed to illustrate its application in the principal cases which have arisen under this head in the Courts of Law and Admiralty. In the courts of law, these cases are very rare, the proceedings being less convenient, and attended with more expense, than the process of the Admiralty; which is, moreover, the peculiar jurisdiction for cases of this kind.

XXXIX. It is a first principle that in the case of one vessel saved by another, the master and crew are strictly the only salvors. The owners claim only under the equitable consideration of the Court, for the risk of their vessel, &c. the Court being not disposed to allow their claim to any great amount. (a)

XL. A convoying ship may be entitled to salvage for the recapture of a vessel which was first taken under its protection, provided the vessel were effectually carried off, and possessed by the enemy. (b) A ship once sent forth and employed as a privateer, or vessel of war, falls within the exception; and is not to be restored upon re-capture, although at the time of the re-capture it may be employed purely as a merchant ship, carrying a

(a) *San Bernardo*, Laretta, 1 Rob.

(b) *The Wight*, Ford, 5 Rob.

But the conduct of France during the last war induced the Courts of this country to depart from this general rule, and to allow salvage on the recapture of neutral property from the French. (a) Upon this principle salvage was given on recapture of neutral property out of the hands of Spanish cruizers; such property having been taken under the Berlin decree, the English Court of Admiralty presuming that it would have been infallibly condemned if carried into a French or Spanish port. (b) And, upon a similar principle, salvage was given for bringing off a Portuguese vessel and cargo belonging to British and Portuguese subjects, which had put into the port of Muros, in Spain, a port within the power of the French, though not within their actual occupation, (c) Upon the same general reason, where a neutral merchant shipped goods on board a British armed ship, which was captured by the enemy, but afterwards recaptured; the Court of Admiralty held, that inasmuch as there was every ground for her condemnation, though a neutral, had she been carried into the enemy's port, salvage was due to the recaptors. (d)

Of Salvage,
in the case of
capture and re-
capture.

XLIII. Salvage on recapture, under the general maritime law, is taken out of the act of parliament by the circumstance that the recaptured vessel never came into the possession of the recaptor. (e) This was a case of salvage on recapture of a British merchantman, which had separated from her convoy during a storm, and had been brought to by a French lugger, which came up and directed the master to stay by her till the storm moderated, when they would send a boat on board. The lugger continued alongside, sometimes a-head and sometimes a-stern, and sometimes to windward, for three or four hours. A British frigate coming in sight, chased the lugger, and captured her; during which time the merchantman made her escape, rejoined the convoy, and came into Pool. Sir William Scott, in giving judgment said, that the only question was, whether it was a case of salvage under the Act of Parliament, the vessel never having come into the actual possession of the recaptor. "I rather incline (he says) to think it is not. The terms of the Act of Parliament, *if at any time afterwards surprised and retaken by any of his Majesty's ships of war, &c.*, seem to point to a case attended with the circumstance of an actual possession taken. But if it be not a case

(a) *Huntress*, Stinson, 6 Rob. 108.

Edw. 115.

Carlotia, Pasqual, 5 Rob. 54.

(d) *Fanny*, Lawton, Dod. 448.

(b) *Sansoni*, Stevens, 6 Rob. 410.

(e) *The Edward and Mary*, 3 Rob.

(c) *Pensamento*, Felix, Macalhaens,

305.

tion, and divesting the owners of their property. But where the property is restored by application to the royal authority, and the master is again put into possession, the Court of Admiralty will look to the equity and substance of the proceeding, and will not consider the right of the salvors to be affected by the legal fiction of conversion. (a) In no instance has more than one half been decreed by way of salvage, except when the Crown alone has been concerned, and no claim made for a private owner. (b)

Of Salvage, in the case of capture and recapture.

XLVI. Many complicate cases have arisen in questions of salvage where the recapture has been joint. There is an obvious distinction in the Admiralty Courts, as to associated ships employed on a specific service, and a fleet not so associated; and this equally holds as to single ships. A privateer actually in chase, and coming up first, has been allowed to share with a king's ship in salvage on recapture; and the apportionment of the reward was according to their respective forces. (c) And in a case where a privateer was the actual recaptor, and a king's ship in sight, the Court decreed one-sixth salvage to be paid by the owners of the recaptured vessel, and only allowed the king's ship to share against the privateer as upon an eighth. (d)

Of salvage, in cases where the recapture is joint.

XLVII. It does not fall within our purpose to examine the numerous cases in which a share in prizes is claimed upon the ground of joint capture: but as many of these cases involve the question of salvage as upon a recapture, it may be necessary to refer to some of the leading decisions. It is not essential that two ships should have pursued the enemy in precisely the same or a parallel direction; even a sailing in opposite directions, with the intention of capturing, will not defeat the unity of purpose or operation. But an *animus persequendi*, coupled with an erroneous course, is not sufficient; nor will a mere going in search establish a joint pursuit. And when a ship or fleet, by accident or design, diverts the course of an enemy's ship, and thereby occasions capture by a totally distinct force, it cannot be considered a joint capture. (e) It is not the disposition of the Court to extend the interests of joint captors beyond the present limits; no service, therefore, antecedent or subsequent, unless the ship be employed in the identical service of the expedition, will impart a prize interest. (f) Constructive assistance by boats cannot entitle the ships to which they

(a) Charlotte Caroline, Dod. 192.

(b) L'Esperance, Dod. 46.

(c) Wanstead, Edw. 268.

(d) The Providence, Edw. 270.

(e) Le Niemen, Dod. 9.

(f) Buenos Ayres, Dod. 33.

the rescue who prays to be rewarded; and therefore, in a case of salvage on recapture of an American ship by the crew, part of whom were British seamen, and claimed to be rewarded, the court overruled the protest against their jurisdiction. It should seem, moreover, that foreign seamen, rescuing a foreign ship and cargo, and bringing them to this country, might entertain an action *in rem* in the British Admiralty Courts. (a) In a case of rescue from the enemy on the part of a British master and boy, one-sixth was given as salvage, the court holding it to be a case of great merit. (b).

Of salvage on rescue.

L. It is the peculiar law of England to restore to the former owner British property captured and retaken from the enemy; the *jus postliminii* still remaining so long as the property is in the hands of the enemy. But the prize act (c) does not give restitution where vessels so taken have been sent forth after capture by the enemy for the purposes of war. (d)

LI. In the case of the ships recaptured from the French at Oporto, by the allied British and Portuguese army, the court refused salvage on Portuguese property; but gave it on British without distinction, including the cargoes which had been reloaded and warehoused by the enemy, and estimated the value at the port of restitution. (e) And in the Admiralty Court the army is alone considered as recaptors, and entitled to sustain a claim of salvage for service done without the co-operation of the naval force. (f) But the liberation of the property by the army must be the immediate and direct consequence of military operations, either in the vicinity of the place besieged, or so as to have an immediate influence on its surrender. (g) And possession of the port of the enemy, in which the vessels were contained, was deemed a sufficient capture to entitle the recaptors to salvage, without having actual possession of each individual ship. And it is not necessary that it should be the primary intention of the captors to recover the property: but it will be sufficient if the service be performed, and the recovery of the property be the immediate and necessary result. (h) So persons not in a military capacity, but merely acting as private individuals, if they happen by any successful effort to rescue property from the enemy, will be entitled to salvage. (i) And recapture by the conjunct operations of the

Of salvage on recapture by a military force.

(a) *Two Friends*, 1 Rob. 279.

(b) *Beaver*, 3 Rob. 292.

(c) 45 Geo. 3. c. 72.

(d) *L'Actife*, Edw. 185. and *see ante*.

(e) *Progress*, Edw. 210.

(f) *Progress*, Edw. 210.

(g) *Id.* 215.

(h) *Id.* 211.

(i) *Ceylon*, Dod. 117.

APPENDIX.

THE NEW NAVIGATION ACTS.

No. I.

An Act to repeal certain Acts, &c. relating to the Importation of Goods and Merchandize.—3 Geo. 4. c. 42.

WHEREAS an act was passed in the Parliament of England, in the twelfth year of the reign of his Majesty King Charles the Second, for the encouraging and increasing of shipping and navigation: and whereas by an act passed in the Parliament of Ireland, in the twenty-seventh year of the reign of his late Majesty King George the Third, intituled “An Act for the further Increase and Encouragement of Shipping and Navigation,” it was enacted, that the said recited act passed in England, in the twelfth year of the reign of King Charles the Second, and every provision therein contained, (so far as the same are not altered or repealed by the said act of the Parliament of Ireland) should be of full force and effect within Ireland: and whereas divers acts have been from time to time passed for the further regulation of shipping, navigation, and commerce; and it is expedient that certain of the provisions contained in the said several acts relating to the countries from whence, and the ships in which goods and merchandize shall be imported into any part of the United Kingdom of Great Britain and Ireland, should be repealed, in order that other regulations relating to such importation may be declared, consolidated, and comprised in one act passed for that purpose: may it therefore please your Majesty that it may be enacted; and be it enacted by the King’s most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act, so much of the said recited act, passed in the twelfth year of the reign of his Majesty King Charles the Second, intituled “An Act for the encouraging and increasing of Shipping and Navigation,” shall be repealed, whereby it is enacted, that no goods or commodities whatsoever, of the growth, production, or manufacture of Asia, Africa, or America, be imported into England, Ireland, or Wales, the islands of Guernsey or Jersey, or town of Berwick upon Tweed, in any other ship or ships, vessel or vessels whatsoever, but in such as do truly and without fraud

English Navigation Act,
12 C. 2. c. 18.

Irish Navigation Act,
27 G. 3. c. 23.

amended by
acts which it
is expedient to
repeal, &c.

Repeal of
12 C. 2. c. 18.
s. 3. as to im-
portation of
goods of Asia,
Africa, or Ame-
rica, in British
ships only.

respectively, from any of the ports of Spain or Portugal, or Western Islands, commonly called Azores, or Madeira or Canary Islands; and so much and such parts of the said act is and are hereby repealed accordingly.

V. And be it further enacted, that from and after the passing of this act, so much of the hereinbefore recited act, passed in the parliament of Ireland in the twenty-seventh year of the reign of his late Majesty King George the Third, intituled "An Act for the further Increase and Encouragement of Shipping and Navigation," whereby it is enacted, that the said act passed in the parliament of England in the twelfth year of the reign of King Charles the Second, for the encouraging and increasing of shipping and navigation, shall be of full force and effect in Ireland, shall be repealed, so far as relates to so much and such parts of the said act of the twelfth year of the reign of King Charles the Second, as is and are hereinbefore recited and repealed; and that so much and such parts of the said recited act of the twelfth year of the reign of King Charles the Second, as is or are repealed by this act, shall cease to be in force in Ireland after the passing of this act; any thing in the said recited act of the parliament of Ireland of the twenty-seventh year of his late Majesty's reign to the contrary in anywise notwithstanding.

VI. And be it further enacted, that from and after the passing of this act, so much of an act passed in the thirteenth and fourteenth years of the reign of King Charles the Second, intituled "An Act for preventing Frauds and regulating Abuses in his Majesty's Customs," shall be repealed, whereby it is enacted and declared, that no sort of wines (other than Rhenish,) no sort of spicery, grocery, tobacco, pot-ashes, pitch, tar, salt, rosin, deal boards, fir timber, or olive oil, shall be imported from the Netherlands or Germany, upon any pretence whatsoever, in any sort of ships or vessels whatsoever, upon penalty of the loss of all the said goods, as also of the ships and furniture; and so much of the said recited act is hereby repealed accordingly.

VII. And be it further enacted, that from and after the passing of this act, so much of the said recited act of the thirteenth and fourteenth years of the reign of King Charles the Second, shall be repealed, whereby it is enacted, that no foreign-built ship shall enjoy the privilege of a ship belonging to England or Ireland, although owned or manned by English (except such ships only as shall be taken at sea by letters of mart or reprisal, and condemnation made in the Court of Admiralty as lawful prize), but that all such ships shall be deemed as alien ships; and so much of the said recited act is hereby repealed accordingly.

VIII. And be it further enacted, that from and after the passing of this act, so much of an act passed in the first year of the reign of Queen Anne, intituled "An Act for granting an Aid to her Majesty by divers Subsidies, and a Land Tax," shall be repealed, whereby it is enacted, that it shall and may be lawful to import, from Hamburgh, wines of the growth of Hungary; and the same is hereby repealed accordingly.

IX. And be it further enacted, that from and after the passing of this act, an act passed in the sixth year of the reign of Queen Anne, intituled "An Act for the Importation of Cochineal from any Port in Spain, during the present War, and Six Months longer," and which, by an act passed in the twelfth year of the reign of the said Queen Anne, was made perpetual, shall be and the same is hereby repealed; any thing in the said recited act of the said twelfth year to the contrary notwithstanding.

X. And be it further enacted, that from and after the passing of this act, an act made in the sixth year of the reign of King George the First,

Irish Act, 27 Geo. 3. c. 23. extending the English Act, 12 C. 2. c. 18. to Ireland, repealed so far as relates to matters repealed by this act.

Repeal of s. 23. of 13 & 14 C. 2. c. 11. prohibiting the importation of certain articles from the Netherlands or Germany.

Repeal of so much of 13 & 14 C. 2. c. 11. s. 6. as relates to privileges of foreign-built ships owned by Englishmen.

Repeal of 1 Anne, st. 1. c. 12. s. 112. as to importation of Hungary wines.

Repeal of 6 Anne, c. 33. as to cochineal, although made perpetual by 12 Anne, st. 1. c. 18. s. 3.

Repeal of 6 Geo. 1. c. 14.

made in the last Session of Parliament, upon certain East India Goods exported from Great Britain, and for granting other Duties instead thereof; and for further encouraging, regulating, and securing several Branches of the Trade of this Kingdom and the British Dominions in America," shall be repealed, whereby it is enacted that it shall and may be lawful to and for any person or persons to import and bring into Great Britain, in British-built ships or vessels navigated according to law, from any port or place whatsoever, any sort of cotton wool; and so much and such part of the said recited act is hereby repealed accordingly.

XVII. And be it further enacted, that from and after the passing of this act, so much and such parts of an act passed in the seventh year of the reign of his late Majesty King George the third, for amending and enforcing certain acts for the more effectual preventing the fraudulent importation and wearing of cambrics and French lawns, shall be repealed, whereby it is enacted, that no cambric or French lawn shall be allowed to be imported into the port of London from any parts beyond the seas, except in British ships navigated according to law; and so much and such parts of the said recited act is and are hereby repealed accordingly.

Repeal of 7 G. 3. c. 43. s. 2. as to importing cambrics in British ships only.

XVIII. And be it further enacted, that from and after the passing of this act, an act passed in the fifteenth year of the reign of his late Majesty King George the Third, intituled "An Act to permit the free Importation of Raw Goat Skins into this Kingdom for a limited time," and which by an act passed in the thirty-first year of the reign of his late Majesty King George the Third, was made perpetual, shall be and the same is hereby repealed; any thing in the said recited act of the said thirty-first year of his late Majesty's reign to the contrary in anywise notwithstanding.

Repeal of 15 G. 3. c. 35. though made perpetual by 31 G. 3. c. 43. as to importation of raw goat-skins.

XIX. And be it further enacted, that from and after the passing of this act, so much of an act made in the nineteenth year of the reign of his late Majesty King George the Third, among other things, for explaining so much of the said hereinbefore recited act of the twelfth year of the reign of King Charles the Second, for the encouraging and increasing of shipping and navigation; as relates to the importation of goods and commodities of the growth or production of Africa, Asia, or America, manufactured in foreign parts, shall be repealed; whereby it is enacted, that the said act of the twelfth year of the reign of King Charles the Second shall not extend or be construed to extend to permit any goods or commodities whatever of the growth or production of Africa, Asia, or America, which shall be in any degree manufactured in foreign parts, to be imported into Great Britain, except and unless the same shall be so manufactured in the country or place of which the goods and commodities are the growth and production, or in the place where such goods and commodities can only be or are first shipped for transportation; and so much and such part of the said act of the nineteenth year of his said late Majesty King George the Third is hereby repealed accordingly.

Repeal of s. 1. of 19 G. 3. c. 48. as to importation of manufactured goods of Asia, &c.

XX. And be it further enacted, that from and after the passing of this act, so much of the said last recited act of the nineteenth year of his said late Majesty's reign shall be repealed, whereby or by construction whereof the importation of oil of cloves, oil of cinnamon, oil of mace, and oil of nutmegs, into Great Britain, is permitted; and so much of the said act is hereby repealed accordingly.

Repeal of s. 2. of 19 G. 3. c. 48. permitting importation of oil of cinnamon, &c.

XXI. And be it further enacted, that from and after the passing of

Repeal of 22 G. 3. c. 78. as

sales belonging to the subjects of the said emperor of Morocco; and so much and such part of the said recited act of the twenty-seventh year of his said late Majesty's reign is hereby repealed accordingly.

XXIV. And be it further enacted, that from and after the passing of this act, so much of an act passed in the thirtieth year of the reign of his said late Majesty King George the Third, intituled "An Act to explain and amend an Act made in the last Session of Parliament, intituled 'An Act for repealing the Duties on Tobacco and Snuff, and for granting new Duties in lieu thereof,'" shall be repealed, whereby it is enacted, that no tobacco (except tobacco of the growth, production, or manufacture of the plantations of Spain and Portugal, and also except snuff,) shall be imported or brought from foreign parts, either wholly or in part manufactured, or in any state or degree of manufacture, on pain of the forfeitures in the said act mentioned; and so much and such part of the said act is hereby repealed accordingly.

Repeal of a. 4. of 30 G. 3. c. 40. as to importation of manufactured tobacco.

XXV. And be it further enacted, that from and after the passing of this act, so much of an act passed in the thirty-fifth year of the reign of his said late Majesty King George the Third, intituled "An Act for allowing the Importation of Rape Seed or other Seeds used for extracting Oil, from any Country whatsoever, whenever the Price of British Middling Rape seed shall be above a certain Limit," shall be repealed, whereby it is enacted or provided, that rape seed, and all other seeds commonly made use of for the purpose of extracting oil therefrom, shall be imported in a British-built ship, owned and navigated according to law: provided always, that nothing herein contained shall extend to allow the importation of any rape seed, or other such seed, in any ship whatsoever, whenever the prices of middling British rape seed shall be below the price of twenty pounds per last.

Repeal of so much of 35 G. 3. c. 117. as provides that rape seed shall be imported in British-built ships.

XXVI. And be it further enacted, that from and after the passing of this act, so much and such part of an act passed in the thirty-sixth year of the reign of his late Majesty King George the Third, intituled "An Act for allowing the Importation of Arrow Root from the British Plantations, and also of Linseed Cakes and Rape Cakes from any Foreign Country, in British-built Ships owned, navigated, and registered according to Law, without payment of Duty," shall be repealed, whereby it is enacted or provided, that linseed cake, or rape cakes, shall be imported from any foreign country whatever, in any British ship or vessel owned, navigated, and registered according to law; and so much and such part of the said act is hereby repealed accordingly.

Repeal of so much of a. 2. of 36 G. 3. c. 113. as provides that linseed cakes shall be imported in British ships.

XXVII. And be it further enacted, that from and after the passing of this act, so much of an act passed in the fifth year of the reign of his late Majesty King George the Third, made, among other things, for more effectually supplying the export trade of this kingdom to Africa with such coarse printed calicoes and other goods of the product or manufacture of the East Indies, or other places beyond the Cape of Good Hope, as are prohibited to be worn and used in Great Britain, under or by virtue of which the commissioners of his Majesty's Treasury are authorized to allow, by licence, certain goods in the said recited act mentioned to be imported into Great Britain, for the purpose of exportation to Africa, under the conditions and regulations therein stated, shall be and the same is hereby repealed.

Repeal of 5 G. 3. c. 30. s. 1, 2. as to licences for importing East India goods for export to Africa.

XXVIII. And be it further enacted, that from and after the passing of this act, every clause, provision, and regulation, with respect to licences granted by the commissioners of customs for the importation of nutmegs, mace, cloves, and cinnamon, contained in an act made in the

Repeal as to licences for importation of spices under 8 Anne, c. 7. s. 13.

place of which such tobacco is the growth, and whereof the master and three-fourths of the mariners at least are of the said country or place, or in vessels which shall have been lawfully condemned as prize in such country or place, and which shall be navigated as aforesaid; and so much and such parts of the said recited act is and are hereby repealed accordingly.

XXXIII. Provided always, and be it enacted, that nothing in this act contained shall extend or be construed to extend to repeal or alter or in any way affect any forfeiture, fine, pain, penalty or punishment, which may have taken place or been incurred for any offence against any of the acts hereby repealed, at any time before the passing of this act, and for or in respect of which any action, suit, indictment, information, or other proceeding may have been brought, had, found, commenced, or prosecuted at any time before the passing of this act; any thing in this present act contained to the contrary in anywise notwithstanding.

Not to affect penalties already incurred under recited acts.

No. II.

An Act for the Encouragement of Navigation and Commerce, by regulating the Importation of Goods and Merchandize, so far as relates to the Countries or Places from whence, and the Ships in which, such Importation shall be made.—3 Geo. 4. c. 43.

WHEREAS an act was passed in the twelfth year of the reign of his Majesty King Charles the Second, for the encouraging and increasing of shipping and navigation, on which the strength and safety of this kingdom do greatly depend: and whereas by an act passed in the parliament of Ireland, in the twenty-seventh year of the reign of his late Majesty King George the Third, intituled "An Act for the further Increase and Encouragement of Shipping and Navigation," it was enacted, that the said recited act passed in England, in the twelfth year of the reign of King Charles the Second, and every provision therein contained, (so far as the same are not altered or repealed by the said act of parliament of Ireland), should be of full force and effect within Ireland: and whereas divers acts have been from time to time passed for the further regulation of shipping, navigation, and commerce; and it is expedient that such of the provisions contained in the said several acts as relate to the countries or places from whence, and the ships in which, goods and merchandize shall be imported into the United Kingdom of Great Britain and Ireland, should be revised and amended, and together with other regulations, be declared and provided, so that the law by which such importation is to be regulated, may be simplified and rendered more certain, as well as more effectual, in promoting the objects of the said several acts, and in facilitating and extending the commerce of the realm; may it therefore please your Majesty, that, for the establishing by law the several rules and provisions under which the importation of goods and merchandize into Great Britain shall be regulated, so far as relates to the countries or places from whence, and the ships in which, such importations shall be made, it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice

12 Car. 2. c. 18-

Irish Act,
27 Geo. 3. c. 23.

those by this act granted to the ships and vessels of such country, port, or place.

VI. And be it further enacted, that from and after the passing of this act, the several sorts of goods and merchandize hereinafter particularly enumerated, mentioned, and described, being of the growth or production of any place in Europe; that is to say, masts, timbers, boards, sail, pitch, tar, tallow, rosin, hemp, flax, currants, raisins, figs, prunes, olive oil, corn or grain, pot-ashes, wine, sugar, vinegar, brandy, or tobacco, shall be imported into the United Kingdom, either in British-built ships or vessels, or in ships or vessels which by law are or may be entitled to the privileges of British-built ships or vessels, registered and navigated according to law, or in ships or vessels of the built of and belonging to the country or place in Europe, of which such goods and merchandize are the growth, produce, or manufacture respectively, or in ships or vessels of the built of and belonging to any port or place in Europe into which such goods and merchandize shall have been brought or imported, and in which the same shall have been landed; and all which foreign ships shall be wholly owned by the people of such country, port, or place, and shall be navigated by a master and three-fourths at least of the mariners thereof of such country, port, or place, and not in any other ship or vessel whatsoever, under penalty of the forfeiture of all such goods or merchandize as shall be imported from any place in Europe, in any ship or vessel not being such British-built ship or vessel, or not being a ship or vessel entitled to the privileges of a British-built ship or vessel as aforesaid, or not being a ship or vessel of such country, port, or place in Europe as aforesaid, and navigated as aforesaid, and also of the forfeiture of a sum not exceeding one hundred pounds by the master or person having the charge or command of such ship or vessel; except only in cases hereinafter specially excepted or provided for.

Certain enumerated European goods shall be imported in British ships, or in ships of the country or port of export in Europe.

Penalty.

VII. Provided always, and be it enacted, that nothing in this act contained shall extend or be construed to extend to prohibit the importation of any goods or merchandize, the growth, production, or manufacture of any part of Europe, and not hereinbefore expressly specified, enumerated, or described, in any ship or vessel whatsoever, and from any place whatsoever, as such goods or merchandize might have been imported into Great Britain at any time before the passing of this act.

Other goods of Europe may be imported in any ships from any place, as heretofore.

VIII. Provided also, and be it enacted, that from and after the passing of this act, goods or merchandize the growth, production, or manufacture of any places within the dominions of the Grand Seigneur, may be imported into the United Kingdom in British-built ships or vessels, registered and navigated according to law, or in ships or vessels of the built of any country or place within the dominions of the Grand Seigneur, wholly owned by the people of such country or place, and navigated by a master and three-fourths at least of the mariners thereof of such country or place; and that such goods and merchandize may be imported for consumption in the United Kingdom; any thing hereinbefore contained to the contrary in anywise notwithstanding.

Goods of any of the Grand Seigneur's dominions may be imported in British or Turkish vessels for home consumption.

IX. Provided also, and be it enacted, that from and after the passing of this act, raw silk and mohair yarn, of the growth, production, or manufacture of Asia, exported to the United Kingdom of Great Britain and Ireland, from any port or places in the Straights or Levant Seas, within the dominions of the Grand Seignior; and also raw silk or mohair yarn, being the growth, production, or manufacture of any place within the dominions of the Grand Seignior within the Levant Seas,

Raw silk and mohair yarn produce of Asia, &c.

Raw silk, &c. from Malta or Gibraltar.

or persons shall belong; and it shall and may be lawful to import in any such ship or vessel any goods or merchandize from any such foreign country, port, or place in Europe, in like manner as if such ship or vessel were of the built of such foreign country, port, or place in Europe; any law, usage, or custom to the contrary notwithstanding: provided always, that in case any such British-built ship or vessel, having once become the property of any person or persons not being a British subject or subjects, shall again become the property of any British subject or subjects, otherwise than by capture and legal condemnation, such ship or vessel shall not, on any pretence whatsoever, be again deemed, taken, or considered to be a British-built ship or vessel, nor entitled to be registered as such, nor to any other privileges or advantages as a British-built ship or vessel, but shall be subject and liable to all the penalties and forfeitures to which foreign ships or vessels are or may be subject or liable by law.

but shall not become British ships again, except by capture.

XIII. Provided always, and be it enacted, that nothing in this act contained shall extend or be construed to extend to repeal such part of the herein-before recited Act, passed in the twelfth year of the reign of King Charles the Second, for the increasing of shipping and navigation, as relates to bullion, or to goods taken by way of reprisal.

Not to affect 12 Car. 2. c. 18. s. 15. as to bullion or prize goods.

XIV. Provided also, and be it declared and enacted, that nothing in this act contained shall extend or be construed to extend to repeal or alter, or in any way to affect or infringe any of the provisions contained in two acts for the union of Great Britain and Ireland, the one made in the parliament of Great Britain in the thirty-ninth and fortieth years of the reign of his said late Majesty King George the Third, and the other made in the parliament of Ireland in the fortieth year of the reign of his said late Majesty, or in any other act or acts in force immediately before the passing of this act, by which the importation of goods or merchandize into Great Britain from Ireland, or into Ireland from Great Britain, is in any way permitted, allowed, restrained, prohibited, or regulated in any manner whatever; but that all goods and merchandize shall and may be imported into Great Britain from Ireland, and into Ireland from Great Britain, from and after the passing of this act, in such manner and under and subject to such regulations in all respects, as are contained in the said acts for the union of Great Britain and Ireland, or in any other act or acts in force immediately before the passing of this act, until provision shall be otherwise made by parliament with respect to the same; any thing in this act contained to the contrary in anywise notwithstanding.

Not to affect intercourse between Great Britain and Ireland.

XV. Provided also, and be it enacted, that nothing in this act contained shall extend or be construed to extend to alter or repeal, or in any way to affect or infringe any act or acts, or any provisions contained in any act or acts, in force immediately before the passing of this act, relating to the importation of any goods and merchandize whatsoever from any British colony, plantation, territory, or dominion in America or the West Indies; and that all goods and merchandize the growth, produce, or manufacture of any such British colony, plantation, territory, or dominion, and all goods and merchandize whatsoever which may by law be imported from any such British colony, plantation, territory, or dominion, shall and may be imported, and shall continue to be imported, in such manner, and under all such rules and regulations, restrictions, penalties, and forfeitures, in all respects, as are contained in any act or acts in force in relation to such goods and merchandize immediately before the passing of this act; any thing in this act contained to the contrary in anywise notwithstanding.

Not to affect the importation of goods the produce of the British colonies in America or the West Indies.

XIX. Provided also, and be it enacted, that nothing in this act contained shall extend or be construed to extend to alter or in any way to affect the rights and privileges of the united company of merchants of England trading to the East Indies, as granted to or vested in the said company by charter, or by any act or acts of parliament; nor to repeal or alter, or in any way to affect or infringe the provisions contained in an act made in the fifty-third year of the reign of his late Majesty King George the Third, intituled, "An Act for continuing in the East India Company, for a further Term, the possession of the British Territories in India, together with certain exclusive Privileges; for establishing further Regulations for the Government of the said Territories, and the better Administration of Justice within the same; and for regulating the Trade to and from the Places within the Limits of the said Company's Charter;" or in an act made in the fifty-seventh year of his said late Majesty's reign, intituled, "An Act to regulate the Trade to and from the Places within the Limits of the Charter of the East India Company, and certain Possessions of His Majesty in the Mediterranean;" or in any other act or acts in force immediately before the passing of this act, relating to the trade or commerce with any of the countries, territories, or places situate within the limits of the charter granted to the said united company of Merchants of England trading to the East Indies, or to the trade and commerce to be carried on by the said East India Company, or by any British subjects, to and from the said countries, territories, or places, under the provisions and regulations of the said recited acts, or of any other act or acts; but that the trade and commerce with all the said countries, territories, or places respectively, shall continue to be carried on in such manner, and under and subject to such regulations, in all respects, as are contained in the said recited acts respectively, or in any act or acts for continuing or amending the same, or any of them, or in any other act or acts relating to such trade and commerce; any thing in this act contained to the contrary notwithstanding.

Not to affect
East India
Trade under
53 G. 3. c. 155.
57 G. 3. c. 36.
or other acts.

XX. Provided also, and be it enacted, that nothing in this act contained shall extend or be construed to extend to repeal or alter any of the provisions contained in an act passed in the forty-ninth year of the reign of his late Majesty King George the third, intituled, "An Act to authorize His Majesty, during the present War, to make Regulations respecting the Trade and Commerce to and from the Cape of Good Hope;" or in an act passed in the fifty-seventh year of his said late Majesty's reign, for continuing and extending the provisions of the said recited act of the forty-ninth year, and also for regulating the trade of the island of Mauritius, (which said recited acts have been continued, and are now in force), whereby his Majesty is authorized, by and with the advice of his privy council, to give such directions, and to make such regulations touching the trade and commerce to and from the Cape of Good Hope, and to and from all islands, colonies, or places, and the territories and dependencies thereof, to his Majesty belonging, or in his possession, in Africa or Asia, to the eastward of the Cape of Good Hope (excepting only the possessions of the East India Company), as to his Majesty in council shall appear most expedient and salutary.

Not to affect
49 G. 3. c. 17.
57 G. 3. c. 1.
for regulating
trade to Cape
of Good Hope
and Mauritius.

XXI. Provided also, and be it enacted, that nothing in this act contained shall extend or be construed to extend to repeal or alter such part of an act made in the eighteenth year of the reign of King George the Second, among other things, for repealing the inland duty upon tea sold in Great Britain, and granting other duties in lieu thereof, and for better securing the duties on tea, or in any other act or acts, whereby it is

Not to affect
18 G. 2. c. 26.
s 10, 11.
whereby tea
may be im-
ported from
Europe in Bri-

Salmon within several Rivers in that Part of this Kingdom called England," or in any other act or acts relating to the importation of fish into any part of the United Kingdom.

XXV. Provided also, and be it enacted, that nothing in this act contained shall extend or be construed to extend to repeal or alter so much of the said last-recited act of the first year of the reign of King George the First, whereby it is enacted, that it shall and may be lawful for any person whatsoever, as well foreigners as British, freely to import, bring in, and sell, in any ship or vessel whatsoever, any quantity of lobsters or turbot, whether they be of foreign or British catching.

Not to affect importation of lobsters and turbot under 1 G. 1. st. 2. c. 18. s. 10.

XXVI. Provided also, and be it enacted, that nothing in this act contained shall extend or be construed to extend to repeal or alter any of the provisions contained in an act passed in the ninth year of the reign of his late Majesty King George the Third, intituled "An Act to permit the free Importation of certain Raw Hides and Skins from Ireland and the British Plantations in America, for a limited Time; and for taking off the Duties upon Seal Skins tanned or tawed in this Kingdom, and for granting another Duty in lieu thereof; for indemnifying all persons with respect to advising or executing any of His Majesty's Orders in Council, prohibiting the Importation of Raw Hides, Horns, and Hoofs of infected Cattle, and to authorize the Prohibition of the Importation of such Hides, Horns, and Hoofs for the future;" by which his Majesty is authorized from time to time, by proclamation or order in council, to prohibit generally, or from any particular country, the importation of any hides or skins, horns or hoofs, or any other part of any cattle or beast, for such time or times, and under such regulations as his Majesty shall judge most expedient and effectual to prevent any contagious distemper from being brought into the kingdom.

Not to affect orders of council under 9 G. 3. c. 39. s. 10. for preventing importation of infected hides, &c.

XXVII. Provided also, and be it enacted, that nothing in this act contained shall extend or be construed to extend to repeal or alter an act made in the forty-seventh year of the reign of his late Majesty King George the Third, intituled "An Act to authorize His Majesty to permit the Importation of Naval Stores from any place in Ships belonging to States in Amity with His Majesty, and navigated in any manner whatsoever;" nor to prevent the importation of naval stores under any licence granted in pursuance of the said recited act.

Not to affect importation of naval stores by licence under 47 G. 3. st. 2. c. 27.

XXVIII. Provided also, and be it enacted, that nothing in this act contained shall extend or be construed to extend to repeal or alter any of the provisions contained in an act passed in the thirty-second year of the reign of his late Majesty King George the Third, for allowing the importation of quercitron or black oak bark, when the price of oak bark shall be under the prices mentioned in an act of the twelfth year of his said Majesty's reign, for encouraging the manufacture of leather.

Not to affect importation of quercitron or black oak bark under 32 G. 3. c. 49. s. 1.

XXIX. Provided also, and be it enacted, that nothing in this act contained shall extend or be construed to extend to alter, repeal, or in any way affect the payment of any duties payable by law to the several companies of merchants of England, commonly called or known by the name of the Levant Company, or the Turkey Company, and the Russia Company; but that all such duties shall continue and remain payable in like manner as before the passing of this act.

Not to affect duties payable to the Turkey Company or the Russia Company.

XXX. Provided also, and be it enacted, that nothing in this act contained shall extend or be construed to extend to repeal or in anywise alter the duties of package, scavage, bailage, or portage, or any other duties payable to the mayor and commonalty of the citizens of the city of London,

Not to affect duties of package, &c. to the corporation of London, &c.

No. III.

An Act to regulate the Trade between his Majesty's Possessions in America and the West Indies and other Places in America and the West Indies.—3 Geo. 4. c. 44.

WHEREAS divers acts of parliament have been from time to time passed, for regulating the importation and exportation of certain articles into and from certain territories, islands, and ports, under the dominion of his Majesty, in America and the West Indies; and it is expedient that the said several acts should be repealed, and other provisions made in lieu thereof: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act, an act passed in the twenty-eighth year of the reign of his late Majesty King George the Third, intituled "An Act for regulating the Trade between the Subjects of his Majesty's Colonies and Plantations in North America, and in the West India Islands, and the Countries belonging to the United States of America, and between his Majesty's said Subjects and the Foreign Islands in the West Indies;" also, an act passed in the twenty-eighth year of the reign of his late Majesty King George the Third, intituled "An Act to allow the Importation of Rum and other Spirits from his Majesty's Colonies or Plantations in the West Indies, into the Province of Quebec, without Payment of Duty, under certain Conditions and Restrictions;" also, an act passed in the twenty-ninth year of the reign of his said late Majesty, intituled "An Act to enable his Majesty to authorize, in case of Necessity, the Importation of Bread, Flour, Indian Corn, and Live Stock, from any of the Territories belonging to the United States of America, into the Province of Quebec, and all the Countries bordering on the Gulf of Saint Lawrence, and the Islands within the said Gulf, and to the Coast of Labrador;" also, another act passed in the twenty-ninth year of the reign of his said late Majesty, intituled "An Act for explaining and amending an Act passed in the last Session of Parliament, intituled 'An Act to regulate the Trade between the Subjects of his Majesty's Colonies and Plantations in North America, and in the West India Islands, and the Countries belonging to the United States of America, and between his Majesty's said subjects and the Foreign Islands in the West Indies;'" also, an act passed in the thirtieth year of the reign of his said late Majesty, intituled "An Act to amend two Acts made in the Twenty-eighth Year of the Reign of his present Majesty, the one intituled 'An Act for regulating the Trade between the Subjects of his Majesty's Colonies and Plantations in North America, and in the West India Islands, and the Countries belonging to the United States of America, and between his Majesty's said Subjects and the Foreign Islands in the West Indies;' and the other intituled 'An Act to allow the Importation of Rum or other Spirits from his Majesty's Colonies or Plantations in the West Indies, into the Province of Quebec, without Payment of Duty, under certain Conditions and Restrictions;'" also, an act passed in the thirty-first Year of

Acts regulating the Importation and Exportation of certain articles into and from certain colonies in America and the West Indies herein recited repealed; viz.

28 G. 3. c. 6.

28 G. 3. c. 39.

29 G. 3. c. 16.

29 G. 3. c. 56.

30 G. 3. c. 8.

muda in British Ships, to be exported to the Territories of the United States of America in Foreign Ships or Vessels, and to permit Articles, the Production of the said United States, to be imported into the said Island in Foreign Ships or Vessels;" also, another act passed in the said fifty-second year of the reign of his said late Majesty, intituled "An Act for allowing certain Articles to be imported into the Bahama Islands, and exported therefrom in Foreign Vessels, and for encouraging the Exportation of Salt from the said Islands;" also, an act passed in the fifty-third year of the reign of his said late Majesty, intituled "An Act to amend an Act of the Twenty-eighth Year of his present Majesty, for allowing the Importation of Rum or other Spirits from his Majesty's Colonies or Plantations in the West Indies into the Province of Quebec, without Payment of Duty;" also, another act passed in the fifty-third year of the reign of his said late Majesty, intituled "An Act for further allowing the Importation and Exportation of certain Articles at the Island of Bermuda;" also, an act passed in the fifty-fourth year of the reign of his said late Majesty, intituled "An Act to revive and make perpetual certain Acts for consolidating and extending the several Laws in force, for allowing the Importation and Exportation of certain Articles into and from certain Ports in the West Indies;" also, an act passed in the fifty-seventh year of the reign of his said late Majesty, intituled "An Act to extend the Powers of Two Acts, for allowing British Plantation Sugar and Coffee, and other Articles, imported into Bermuda in British Ships, to be exported to America in Foreign Vessels, and to permit Articles, the Produce of America, to be imported into the said Island in Foreign Ships, to certain other Articles;" also, another act passed in the said fifty-seventh year of the reign of his said late Majesty, intituled "An Act to extend several Acts for allowing the Importation and Exportation of certain Goods and Merchandize to Porta Maria in the Island of Jamaica, and to the Port of Bridge Town in the Island of Barbadoes;" also, an act passed in the fifty-eighth year of the reign of his said late Majesty, intituled "An Act to allow, for Three Years, and until Six Weeks after the Commencement of the then next Session of Parliament, the Importation, into Ports specially appointed by his Majesty, within the Provinces of Nova Scotia and New Brunswick, of the Articles therein enumerated, and the Re-exportation thereof from such Ports; also, an act passed in the said fifty-eighth year of the reign of his said late Majesty, intituled "An Act to permit the Importation of certain Articles into his Majesty's Colonies or Plantations in the West Indies, or on the Continent of South America, and also certain Articles into certain Ports in the West Indies;" also, an act passed in the fifty-ninth year of the reign of his said late Majesty, intituled "An Act to make perpetual an Act of the Forty-fourth Year of his present Majesty, for permitting the Exportation of Salt from the Port of Nassau in the Island of New Providence, the Port of Exuma, and the Port of Crooked Island, in the Bahama Islands, in American Ships coming in Ballast;" also, an act passed in the fifty-ninth year of the reign of his said late Majesty, intituled "An Act to extend the Provisions of Three Acts of the Fifty-second, Fifty-third, and Fifty-seventh Years of his present Majesty, for allowing British Plantation Sugar and Coffee, and other Articles, imported into Bermuda in British Ships, to be exported to America in Foreign Vessels, and to permit Articles, the Produce of America, to be imported into Bermuda in Foreign Ships, to certain other Articles;" also, an act passed in the first year of the reign of his present Majesty, intituled "An Act to extend several Acts for allowing

52 G. 3. c. 79.
53 G. 3. c. 37.
53 G. 3. c. 50.
54 G. 3. c. 48.
57 G. 3. c. 28.
57 G. 3. c. 74.
58 G. 3. c. 19.
58 G. 3. c. 27.
59 G. 3. c. 18.
59 G. 3. c. 58.
1 G. 4. c. 12.

such colony, plantation, or island, for the due landing the said articles at the port or ports for which entered, and for producing a certificate thereof within twelve months from the date of such bond, under the hand and seal of the British consul or vice-consul resident at the port or place where the said articles shall have been landed; but in case there shall not be any such consul or vice-consul there resident, such certificate to be under the hand and seal of the chief magistrate, or under the hand and seal of two known British merchants residing at such port or place; but such bond may be discharged by proof on oath by credible persons, that the said articles were taken by enemies, or perished in the seas: provided always, that nothing herein contained shall be construed to permit or allow the exportation of any arms or naval stores, unless a licence shall have been obtained for that purpose from his Majesty's secretary of state; and in case any such articles shall be shipped or waterborne for the purpose of being exported contrary to this act, the same shall be forfeited, and shall and may be seized and prosecuted as hereinafter directed.

V. Provided always, and be it further enacted, that for ten years after the passing of this act, nothing in this act contained shall extend or be construed to extend to exclude from the trade allowed by this act any foreign ship or vessel, which previous to the passing of this act, may have been engaged in lawful trade with his Majesty's said colonies, islands, or plantations, on account of such ship or vessel not being of the built of the country to which such ship or vessel may belong.

VI. And be it further enacted, that in case any doubt shall arise, whether any goods, wares, or merchandize intended to be exported in any foreign ship or vessel, under the authority of this act, had been legally imported into such port, the legality of such importation shall be made to appear to the satisfaction of the collector and comptroller, or other principal officer of the customs of such port, before such goods, wares, and merchandize shall be suffered to be shipped for exportation.

VII. And be it further enacted, that from and after the passing of this act, there shall be raised, levied, collected, and paid unto his Majesty, his heirs and successors, upon the several articles enumerated or described in the said Schedule marked (C), imported or brought into any of the ports enumerated in the Schedule marked (A.) from any such foreign island, state, or country, under the authority of this act, the several duties of customs as the same are respectively inserted or described and set forth in figures in the said Schedule annexed to this act, marked (C.), and the same shall be under the management of the commissioners of the customs in England, and shall be raised, levied, collected, paid, and recovered in such and the like manner and form, and by such and the like rules, ways, means, and methods respectively, and under such penalties and forfeitures, as any other duties now payable to his Majesty on goods imported into any of the islands, plantations, colonies, or territories belonging to or under the dominion of his Majesty in America or the West Indies, are or may be raised, levied, collected, paid, and recovered by any act or acts of parliament now in force, as fully and effectually to all intents and purposes as if the several clauses, powers, directions, penalties, and forfeitures relating thereto, were particularly repeated and again enacted in the body of this act; and the produce of such duties shall be paid by the collector of the customs to the treasurer or receiver general of the colony, province or plantation in which the same shall be respectively levied, to be applied to such uses and purposes as may be directed by the authority of the respective general courts or general assemblies of such colonies, provinces, or plantations.

Not to allow the exportation of arms or naval stores, without licence of his Majesty's Secretary of State.

Not to exclude foreign vessels though not of the built of the country, such vessels having been before engaged in lawful trade with the colonies.

Proof of the legality of importation to be made before goods shall be exported.

On importation of articles into the ports mentioned in Schedule (A.) certain duties specified in Schedule (C.) to be paid for the use of the colonies.

colony, plantation, or island; and the value so declared on the oaths of such persons shall be deemed to be the true and real value of such articles, and upon which the duties specified in the said Schedule marked (C.) shall be charged and paid.

X. And be it further enacted, that if the importer or proprietor of such articles shall refuse to pay the duties hereby imposed thereon, it shall and may be lawful for the collector or other chief officer of the customs where such articles shall be imported, and he is hereby respectively required, to take and secure the same, with the casks or other package thereof, and to cause the same to be publicly sold, within the space of twenty days at the most after such refusal made, and at such time and place as such officer shall, by four or more days' public notice, appoint for that purpose, which articles shall be sold to the best bidder; and the money arising by the sale thereof shall be applied, in the first place, in payment of the said duties, together with the charges that shall have been occasioned by the said sale; and the overplus, if any, shall be paid to such importer or proprietor, or any other person authorized to receive the same.

Importer refusing to pay the duties, the articles to be sold, &c.

XI. And be it further enacted, that whenever any foreign article is liable to duty by this act on the importation thereof into any of his Majesty's colonies, plantations, or islands in America or the West Indies, under the provisions of this act, the like duty shall be payable upon any such foreign article when imported into any such colonies, plantations, or islands direct from any part of the United Kingdom of Great Britain and Ireland; and such duty shall be raised, levied, collected, and paid, in such and the like manner, and be appropriated and applied to such and the like uses, as the duty payable upon the like article imported from any other place, under the provisions of this act, is by this act directed to be raised and applied.

Foreign articles charged with duty on importation from place of growth, to pay the same duty as on importation of such articles direct from the United Kingdom.

XII. Provided always, and be it further enacted, that if upon the importation of any article charged with duty by this act, the said article shall also be liable to the payment of duty under the authority of any colonial law, equal to or exceeding in amount the duty charged by this act, then and in such case the duty charged upon such article by this act shall not be demanded or paid upon the importation of such article: provided also, that if the duty payable under such colonial law shall be less in amount than the duty payable by this act, then and in such case the difference only in the amount of the duty payable by this act, and the duty payable under the authority of such colonial law, shall be deemed to be the duty payable by this act; and the same shall be collected and paid in such and the like manner, and appropriated and applied to such and the like uses, as the duties specified in the said Schedule annexed to this act marked (C.) are directed to be collected, paid, appropriated, and applied.

Duties not payable if articles are liable to a colonial duty equal in amount to the duties hereby charged.

If colonial duty be less, the difference only to be paid.

XIII. And be it further enacted, that all sums of money granted and imposed by this act as duties shall be deemed and are hereby declared to be sterling money of Great Britain, and shall be collected, recovered, and paid, to the amount of the value which such nominal sums bear in Great Britain; and that such monies may be received and taken according to the proportion and value of five shillings and sixpence the ounce in silver.

Duties to be sterling money at a certain rate.

XIV. And be it further enacted, that any article enumerated in the Schedule (B.) legally imported as aforesaid under the authority of this act shall be allowed to be exported in any British ship or vessel, owned and navigated according to law, to any other British island, colony, or plantation in America or the West Indies, provided that upon the im-

Articles enumerated in Schedule (B.) may be exported to any other British colony,

council, all the privileges and advantages of this act, and all the provisions, penalties, and forfeitures therein contained, shall extend and be deemed and construed to extend to any such port or ports respectively, as fully as if the same had been inserted and enumerated in the said schedule at the time of passing this act.

XVII. And be it further enacted, that no articles, except such as are enumerated in the Schedule marked (B.), shall be imported in any such British-built ship or vessel, or in any such foreign ship or vessel, or in any British-built ship or vessel so sold as aforesaid, from any foreign country or state, on the continent of America, or island in the West Indies, into any of the ports enumerated in the Schedule marked (A.), or into any port which may be added to the Schedule marked (A.), by virtue of any order in council as aforesaid, on any pretence whatever, on pain of forfeiting such articles, together with the ship or vessel in which the same shall have been imported, and the guns, tackle, apparel, and furniture of such ship or vessel; and in every such case the same shall and may be seized by any officer or officers of his Majesty's customs or navy, who are or shall be authorized and empowered to make seizures in cases of forfeiture, and shall and may be prosecuted in such manner as hereinafter directed.

No articles, except such as are enumerated in the Schedule (B.) to be imported, on pain of forfeiture, with the vessel, &c.

XVIII. And be it further enacted, that no articles whatever shall be imported or exported, either in a British-built ship or vessel, or in any such foreign ship or vessel as aforesaid, from or to any foreign country on the continent of North or South America, or from or to any foreign island in the West Indies, into or from any port of any British colony, plantation, or island in America or the West Indies, not enumerated in the Schedule annexed to this act marked (A.) on any pretence whatever, on forfeiture of such articles, as also the ship or vessel in which the same shall be imported, with all her guns, furniture, ammunition, tackle, and apparel.

No articles to be imported or exported, except to the ports mentioned in Schedule (A.)

XIX. Provided always, and be it further enacted, that nothing in this act contained shall affect or be construed to affect the right which British subjects or others may enjoy under any law in force at the passing of this act, of exporting in British ships from ports not enumerated in the said Schedule marked (A.) the produce of the fisheries carried on from any of his Majesty's said colonies, plantations, or islands.

Not to affect the right of exporting, in British ships, the produce of the fisheries.

XX. And be it further enacted, that all penalties and forfeitures imposed by this act shall and may be respectively prosecuted, sued for, and recovered, and divided in Great Britain, Guernsey, Jersey, or the Isle of Man, or in any of his Majesty's colonies or islands in America, in the same manner and form, and by the same rules and regulations in all respects, in so far as the same are applicable, as any other penalties and forfeitures imposed by any act or acts of parliament made for the security of the revenue of the customs, or for the regulation or improvement thereof, or for the regulation of trade or navigation, and which were in force immediately before the passing of this act, may be respectively prosecuted, sued for, recovered, and divided in Great Britain, Guernsey, Jersey, or the Isle of Man, or in any of his Majesty's colonies or islands in America.

How penalties and forfeitures are to be recovered.

SCHEDULES

TO WHICH THIS ACT REFERS.

SCHEDULE (A).

LIST OF FREE PORTS.

Kingston, Savannah Le Mar, Montego Bay, Santa	}	JAMAICA.
Lucia, Antonio, Saint Ann, Falmouth, Maria,		
Morant Bay		
Saint George	-	GRENADA.
Roseau	-	DOMINICA.
Saint John's	-	ANTIGUA.
San Josef	-	TRINIDAD.
Scarborough	-	TOBAGO.
Road Harbour	-	TORTOLA.
Nassau	-	NEW PROVIDENCE.
Pitt's Town	-	CROOKED ISLAND.
Kingston	-	SAINT VINCENT.
Port St. George and Port Hamilton	-	BERMUDA.
Any Port where there is a Custom House	-	BAHAMAS.
Bridgetown	-	BARBADOES.
St. John's, St. Andrew's	-	NEW BRUNSWICK.
Halifax	-	NOVA SCOTIA.
Quebec	-	CANADA.
St. John's	-	NEWFOUNDLAND.
George Town	-	DEMARARA.
New Amsterdam	-	BERBICE.
Castries	-	ST. LUCIA.
Basseterre	-	ST. KITTS.
Charles Town	-	NEVIS.
Plymouth	-	MONTSEERAT.

SCHEDULE (B.)

Asses.

Barley.

Beans.

Biscuit.

Bread.

Beaver, and all sorts of Fur.

Bowsprits.

Calavances.

Cocoa.

Cattle.

Cochineal.

Coin and Bullion.

Cotton Wool.

Drugs of all sorts.

Diamonds and Precious Stones.

Flax.

Fruit and Vegetables.

Fustick, and all sorts of Wood for
Dyers' use.

Flour.

Grain of any sort.

Garden Seeds.

Hay.

Hemp.

Heading Boards.

Horses.

Hogs.

Hides.

Hoops.

Hard Wood or Mill Timber.

Indian Corn Meal.

Indigo.

Live Stock of any sort.

Lumber.

Logwood.

Mahogany, and other Wood for
Cabinet Wares.

Masts.

Mules.

Neat Cattle.

Oats.

Pease.

Potatoes.

Poultry.

Pitch.

Rye.

Rice.

Staves.

Skins.

Shingles.

Sheep.

Tar.

Tallow.

Tobacco.

Turpentine.

Timber.

Tortoise-shell.

Wool.

Wheat.

Yards.

An Act to regulate the Trade between his Majesty's Possessions in America and the West Indies, and other Parts of the World.
—3 Geo. 4. c. 45.

WHEREAS it is expedient to allow greater freedom of trade and intercourse between the colonies, plantations, and islands belonging to his Majesty, in America and in the West Indies, and other parts of the world; and to repeal certain acts now in force relating to the trade and intercourse hitherto allowed to be carried on between his Majesty's colonies, plantations, islands, and places in Europe south of Cape Finisterre, and to make further provision for encouraging and extending the same: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that so much of an act passed in the twenty-fifth year of the reign of King Charles the Second, intituled "An Act for the Encouragement of the Greenland and Eastland Trades, and for the better securing the Plantation Trade" as imposes a duty upon the exportation of sugar, tobacco, cotton wool, indigo, ginger, logwood, fustic, dying wood, and cocoa nuts, from any of his Majesty's plantations in America, Asia, or Africa; also an act passed in the fifty-first year of the reign of his late Majesty King George the Third, intituled "An Act to regulate the Trade between Places in Europe South of Cape Finisterre, and certain Ports in the British Colonies in North America;" also an Act passed in the fifty-second year of the reign of his said late Majesty, intituled "An Act to permit Sugar, Coffee, and Cocoa, to be exported from his Majesty's Colonies and Plantations to any Port in Europe to the South of Cape Finisterre, and Corn to be imported from any such Port, and from the Coast of Africa into the said Colonies and Plantations, under Licences granted by the Collectors and Comptrollers of the Customs;" also, so much of an act passed in the fifty-fifth year of the reign of his said late Majesty, intituled "An Act to regulate the Trade between Malta and its Dependencies and his Majesty's Colonies and Plantations in America, and also between Malta and the United Kingdom," as relates to the trade allowed to be carried on between the Island of Malta and the Dependencies thereof, and his Majesty's Colonies and Plantations in America; also an act passed in the fifty-seventh year of the reign of his said late Majesty, intituled "An Act to extend the Privileges of the Trade of Malta to the Port of Gibraltar;" also another act passed in the fifty-seventh year of the reign of his said late Majesty, intituled "An Act to allow the Importation of Oranges and Lemons from the Azores and the Madeiras into the British Colonies in North America, shall be and the same are hereby repealed, save and except as to the recovery of any forfeiture or penalty incurred on or before the passing of this act: provided nevertheless, that all acts expressly repealed by any of the said acts shall be deemed and taken to be and shall remain repealed.

Acts and parts of acts regulating trade and intercourse between the British colonies and Europe repealed; viz. 25 C. 2. c. 7.

51 G. 3. c. 97.

52 G. 3. c. 98.

55 G. 3. c. 29.

57 G. 3. c. 4.

57 G. 3. c. 89.

exported by virtue of this act, all such articles so taken or laden on board such ship or vessel shall be forfeited and lost, and shall and may be seized by the commander or commanders of any of his Majesty's ships or vessels of war, or any commissioned, warrant, or petty officer specially authorized by him or them, or by any officer or officers of the customs; and the master and shipper of any such goods shall severally forfeit double the value of the goods so laden or taken on board contrary to the directions of this act.

VI. And be it further enacted, that the person exporting fish from any British colony or plantation in North America, to any port or place as aforesaid, under the authority of this Act, shall make oath at the port of shipment, before the chief officer of the customs at such port, or if there be no such chief officer of the customs, then before a magistrate, or if there be no magistrate, then before two respectable persons being at such port or ports (which oath such officer of the customs, or magistrate, or such respectable persons as aforesaid, are hereby authorized to administer) that the said fish is the produce of the British fisheries, really and *bonâ fide* taken and cured by his Majesty's subjects carrying on the said fisheries from some of the British colonies or plantations in North America.

Before shipment of fish, oath to be made that it is the produce of the British fisheries.

VII. And be it further enacted, that before the shipment of any pickled fish or dry fish, for the purpose of exportation from Canada to any port or place as aforesaid, under the authority of this act, the person in whose possession the same shall have continued from the time of its being landed from the British fishing vessel employed in the taking it, until the same shall be so shipped for exportation, shall make oath before the chief officers of the customs at Quebec (who is hereby authorized to administer such oath), that the same is the produce of the British American fisheries, really and *bonâ fide* taken and cured by his Majesty's subjects carrying on the said fisheries from some of the said colonies or plantations.

Upon shipment of pickled or dry fish from Canada, oath to be made of its being the produce of the British fisheries.

VIII. And be it further enacted, that it shall be lawful to export in any British ship or vessel, owned and navigated according to law, from any foreign port in Europe or in Africa, or from Gibraltar, the island of Malta or the dependencies thereof, or the islands of Guernsey, Jersey, Alderney, or Sark, to any of his Majesty's colonies, plantations, or islands in America or the West Indies, the articles enumerated or described in the Schedule hereunto annexed marked (A.); any thing contained in an act made in England in the fifteenth year of the reign of his Majesty King Charles the Second, intituled "An Act for the Encouragement of Trade," or any other act or acts in force in the United Kingdom, or in Great Britain or Ireland respectively, to the contrary notwithstanding.

The articles enumerated in the Schedule marked (A.) may be exported from certain places in Europe, or in Africa, to his Majesty's colonies, plantations, or islands, in British ships.

IX. And be it further enacted, that from and after the passing of this act there shall be raised, levied, collected, and paid unto his Majesty, his heirs and successors, upon the importation of the several articles enumerated or described in the Schedule hereunto annexed marked (B.), into any of his Majesty's colonies, plantations, or islands in America or the West Indies, under the authority of this act, from any port or place in Europe or Africa as aforesaid, the several duties of customs, as the same are respectively inserted or described and set forth in figures in the said Schedule marked B.; and the same shall be raised, levied, collected, paid, and received under the management of the commissioners of the customs in England, in such and the like manner and form, and by such and the like rules, ways, means, and methods respectively, and under such

Duties to be paid on articles enumerated in the Schedule (B.) upon their importation into the colonies, &c.

addition of ten pounds *per centum* thereon, shall be deemed and taken to be the value of such articles in such colony, plantation, or island as aforesaid, in lieu of the value so declared by the importer or proprietor, or his known agent or factor, and upon which the duties specified in the said Table shall be charged and paid: provided also that if it shall appear to the collector or other chief officer of the customs, that such articles have been invoiced below the real and true value thereof at the place from whence the same were imported, or if the invoice price is not known, the articles shall, in such case, be examined by two competent persons, to be nominated and appointed by the governor or commander-in-chief of the colony, plantation, or island into which the said articles are imported; and such persons shall declare on oath, before the collector or other chief officer of the customs, which oath such collector or other chief officer of the customs is hereby authorized to administer, what is the true and real value of such articles in such colony, plantation, or island; and the value so declared on the oaths of such persons shall be deemed to be the true and real value of such articles, and upon which the duties specified in the said Schedule marked (B.) shall be charged and paid.

or in case the value or invoice price is not known.

XII. And be it further enacted, that if the importer or proprietor of such articles shall refuse to pay the duties hereby imposed thereon, it shall and may be lawful for the collector or other chief officer of the customs where such articles shall be * imposed, and he is hereby respectively required, to take and secure the same, with the casks or other package thereof, and to cause the same to be publicly sold, within the space of twenty days at the most after such refusal made, and at such time and place as such officer shall, by four or more days' public notice, appoint for that purpose, which articles shall be sold to the highest bidder; and the money arising from the sale thereof shall be applied to the payment of the said duties, together with the charges which shall have been occasioned by the said sale; and the overplus (if any), shall be paid to such importer, proprietor, or any other person authorized to receive the same.

Importer refusing to pay the duties, the articles to be publicly sold, and the duties and charges deducted.

XIII. Provided always, and be it further enacted, that if upon the importation of any article charged with duty by this act, the said article shall also be liable to the payment of duty under the authority of any colonial law, equal to or exceeding in amount the duty charged upon such article by this act, then and in such case the duty charged upon such article by this act shall not be demanded or paid upon the importation of such article: provided also, that if the duty payable under such colonial law shall be less in amount than the duty payable by this act, then and in such case the difference only in the amount of the duty payable by this act, and the duty payable under the authority of such colonial law, shall be deemed to be the duty payable by this act; and the same shall be collected and paid in such and the like manner, and appropriated and applied to such and the like uses, as the duties specified in the said Schedule annexed to this act marked (B.) are directed to be collected, paid, appropriated, and applied.

Duties not payable if the articles are liable a colonial duty equal in amount to the duties hereby charged.

If colonial duty be less, the difference only be paid.

XIV. And be it further enacted, that all sums of money granted and imposed by this act either as duties, penalties, or forfeitures, shall be deemed and are hereby declared to be sterling money of Great Britain, and shall be collected, recovered, and paid, to the amount of the value which such nominal sums bear in Great Britain; and that such monies may be received and taken according to the proportion and value of five shillings and sixpence the ounce in silver.

Duties, penalties, and forfeitures to be sterling money at a certain rate.

* Sic Stat. sed quare importet.

SCHEDULE (B.)

A SCHEDULE of Duties payable on Articles imported into His Majesty's Colonies, Plantations, or Islands in America or the West Indies, from Ports in Europe or Africa, under the Authority of this Act.

Wine, imported in Bottles, viz.—			£	s.	d.
— French Wine	- - -	the Tun of 252 Gallons	10	10	0
— Madeira Wine	- - -	the Tun of 252 Gallons	7	7	0
— Portugal Wine	- - -	the Tun of 252 Gallons	7	7	0
— Rhenish, Germany and	}	the Tun of 252 Gallons	9	9	0
— Hungary Wine					
— Spanish Wine, and	}	the Tun of 252 Gallons	7	7	0
— Wine not otherwise enumerated					
— And in addition to the specified duties hereby imposed upon such Wines respectively, a further Duty for every 100% of the true and real Value thereof			7	10	0
— And for every Dozen of Foreign Quart Bottles, in which such Wine may be imported			0	8	0
Corn	- - -	For every 100% of the true and real Value thereof	12	0	0
Flour	- - -				
Grain	- - -				
Meal	- - -				
Peas	- - -				
Beans	- - -				
Headings	- - -	for every 1,000	1	1	0
Lumber, viz. Yellow or White Pine	- - -	per 1,000 Feet	1	1	0
— all other Descriptions			1	8	0
Mill Timber, the like	- - -	- - -	10	0	0
Shingles, for every 1,000, not exceeding 12 Inches in length	- - -	- - -	0	7	0
— for every 1,000, exceeding 12 Inches			0	14	0
Staves, Oak, Red or White	- - -	for every 1,000	1	1	0
Wood Hoops	- - -	for every 1,000	0	5	3
Alabaster	- - -	For every 100% of the true and real Value thereof	7	10	0
Anchovies	- - -				
Argol	- - -				
Anniseed	- - -				
Amber	- - -				
Almonds	- - -				
Brandy	- - -				
Brimstone	- - -				
Botargo	- - -				
Boxwood	- - -				

Schedule (B.)—continued.

		£	s.	d.
Opium	-			
Orris Root	-			
Ostrich Feathers	-			
Ochres	-			
Orange Buds, and Peel	-			
Olives	-			
Pickles, in Jars and Bottles	-			
Paintings	-			
Pozzolana	-			
Pumice Stone	-			
Pumck	-			
Parmesan Cheese	-			
Pickles	-			
Prints	-			
Pearls	-			
Precious Stones (except Diamonds)	-			
Quicksilver	-	For every 100 <i>l.</i> of the true and real Value thereof		
Raisins	-			
Rhubarb	-			
Rice	-			
Sausages	-			
Senna	-			
Scmmony	-			
Sarsaparilla	-			
Saffron	-			
Safflower	-			
Sponges	-			
Vermillion	-			
Vermicelli	-			
Wine, not in Bottles, except Wine imported into New- foundland	-			
Whetstones	-			
			7	10 0

intituled "An Act more effectually to secure the Performance of Quarantine, and for amending several Laws relating to the Revenue of Customs," as relates to masters of ships or vessels detaining the certificates of registry of the same; and also so much of an act passed in the thirty-fourth year of the reign of his late Majesty King George the Third, intituled "An Act for the further Encouragement of British Mariners, and for other Purposes therein mentioned," as relates to the transfer or contract, or agreement for transfer, and the alteration of property in any ship or vessel, and as relates to the certificate of registry being withheld or detained by the master of the ship or vessel, and as relates to the registering a ship or vessel *de novo*, under the several circumstances therein mentioned; and also the whole of an act passed in the forty-eighth year of the reign of his late Majesty King George the Third, intituled "An Act to provide that British Ships which shall be captured by the enemy, and shall afterwards become the Property of British Subjects, shall not be entitled to the Privileges of British ships;" and also the whole of an act passed in the forty-ninth year of the reign of his late Majesty, intituled "An Act to amend an Act made in the Forty-eighth Year of his present Majesty, to provide that British Ships captured by the Enemy, becoming the property of British subjects, shall not be entitled to the privileges of British Ships;" and also so much of an act passed in the fifty-fifth year of the reign of his said late Majesty, intituled "An Act to make further Regulations for the Registry of Ships built in India," as relates in any way to the registering of ships or vessels in India; and also the whole of an act passed in the fifty-ninth year of the reign of his late Majesty King George the Third, intituled "An Act to ascertain the Tonnage of Vessels propelled by Steam;" and also so much of an act passed in the first year of the reign of his present Majesty King George the Fourth, intituled "An Act for granting the Privileges of British Ships to Vessels built at Malta, Gibraltar, and Heligoland, and certain of those Privileges to Vessels built in the British Settlements at Honduras," as relates to the registering of ships or vessels at Malta, Gibraltar, and Heligoland; and also all and every other act, or so much of any other act passed in Great Britain or in Ireland, as relates in any way to the registering of ships and vessels; shall be and the same are hereby respectively repealed.

28 G. 3. c. 34.

34 G. 3. c. 68.

48 G. 3. c. 70.

49 G. 3. c. 41.

55 G. 3. c. 116.

59 G. 3. c. 5.

1 G. 4. c. 9.

II. And be it further enacted, that from and after the thirty-first day of December one thousand eight hundred and twenty-three, no ship or vessel having a deck, or being of the burthen of fifteen tons or upwards, shall be entitled to any of the privileges or advantages of a British ship, until the person or persons claiming property therein shall have caused the same to be registered in manner hereinafter mentioned, and shall have obtained a certificate of such registry from the person or persons authorized to make such registry and grant such certificate as hereinafter directed; the form of which certificate shall be as follows; *videlicet*,

No vessel to enjoy privileges until registered.

'THIS is to certify, that in pursuance of an act passed in the fourth year of the reign of King George the Fourth, intituled *An Act* [here insert the title of the act, the names, occupation, and residence of the subscribing owners], having taken and subscribed the oath required by this act, and having sworn that [he, or they] together with [names, occupations, and residence of non-subscribing owners [is, or are] sole owner or owners, in the proportions specified on the back hereof, of the ship or vessel called the [ship's name] of [place to which the vessel belongs] which is of the burthen of [number of tons], and whereof [master's name] is master; and that the said ship or vessel was [when and where

Certificate of registry.

governor, lieutenant governor, or commander in chief of such colonies, plantations, islands, and territories respectively, in respect of ships or vessels to be there registered; and the collector of duties at any port in the territories under the government of the East India Company, and other territories belonging to his Majesty within the limits of the charter of the said company, payable to the said company, or any other person of the rank, in the said company's service, of senior merchant, or of six years' standing in the said service, being respectively appointed to act in the execution of this act, by any of the governments of the said company in India, in any ports in which there shall be no collector and comptroller of his Majesty's customs in respect of ships or vessels to be there registered; and the governor, lieutenant governor, or commander in chief of Malta, Gibraltar, Heligoland and Cape of Good Hope respectively in respect of ships or vessels to be there registered: provided always, that no ship or vessel registered by such collector or other person in India shall be entitled to the privileges and advantages of British ships in any trade or voyages beyond the limits of the said company's charter, other than and except such as are specified in an act passed in the fifty-third year of the reign of his late Majesty King George the Third, and made for the regulation, among other things, of the trade to and from the places within the said company's charter, and in other subsequent acts made and passed or to be hereafter made and passed for the further regulation of the trade to and from such places: provided also, that no ship or vessel shall be registered at Malta, Gibraltar, or Heligoland, except such as are wholly of the built of those places respectively, and such ships or vessels shall not be registered elsewhere; and that such ships or vessels so registered shall not be entitled to the privileges and advantages of British ships in any trade between the said United Kingdom and any of the colonies, plantations, islands, or territories in America to his Majesty belonging: provided also, that whenever in and by this act it is directed or provided that any act, matter, or thing shall and may be done or performed by, to, or with any collector and comptroller of his Majesty's customs, the same shall or may be done or performed by, to, or with the principal officers of customs in the islands of Guernsey or Jersey, together with the governor, lieutenant governor, or commander in chief of those islands respectively; and also by, to, or with such collector or other person in India, in the service of the East India Company as aforesaid; and also by, to, or with the governor, lieutenant governor, or commander in chief of Malta, Gibraltar, Heligoland, or Cape of Good Hope, and according as the same act, matter, or thing is to be done or performed at the said several and respective places, and within the jurisdiction of the said several persons respectively: provided also, that wherever in and by this act it is directed or provided that any act, matter, or thing shall or may be done or performed by, to, or with the commissioners of his Majesty's customs, the same shall or may be done or performed by, to, or with the said commissioners, or any two or more of them in England, Ireland, or Scotland respectively; and also by, to, or with the governor, lieutenant governor, or commander in chief of any place where any ship or vessel may be registered under the authority of this act, so far as such act, matter, or thing can be applicable to the registering of any ship or vessel at such place.

IV. And be it further enacted, that from and after the said thirty-first day of December one thousand eight hundred and twenty-three, in case any ship or vessel, not being duly registered, and not having obtained such certificate of registry as aforesaid, shall exercise any of the

Provision as to vessels registered in India.

Provision as to vessels registered at Malta, Gibraltar, or Heligoland.

Certain powers of collectors and comptrollers, by whom to be exercised in certain cases.

Acts may be done by two commissioners of customs in England, Ireland, and Scotland, and by governors, &c. where vessels may be registered.

Ships exercising privileges before registry to be forfeited.

paired to the advantage of the owners thereof, and shall for such reasons be sold by order or decree of any competent court for the benefit of the owners of such ship or vessel, or other persons interested therein, the same shall be taken and deemed to be a ship or vessel lost or broken up, to all intents and purposes within the meaning of this act, and shall never again be entitled to the privileges of a British-built ship, for any purposes of trade or navigation.

VIII. And be it further enacted, that no British ship or vessel which has been or shall hereafter be captured by, and become prize to an enemy, or sold to foreigners, shall again be entitled to the privileges of a British ship: provided always, that nothing contained in this act shall extend to prevent the registering of any ship or vessel whatever, which shall be condemned in any court of admiralty as prize of war, or in any competent court for breach of laws made for the prevention of the slave trade.

IX. And be it further enacted, that no such registry shall hereafter be made, or certificate thereof granted, by any person or persons hereinbefore authorized to make such registry, and grant such certificate, in any other port or place than the port or place to which such ship or vessel shall properly belong, except so far as relates to such ships or vessels as shall be condemned as prizes in any of the islands of Guernsey, Jersey, or Man; which ships or vessels shall in future be registered in manner hereinafter directed; but that all and every registry and certificate granted, in any port or place to which any such ship or vessel does not properly belong, shall be utterly null and void to all intents and purposes, unless the officers aforesaid shall be specially authorized and empowered to make such registry, and grant such certificate in any other port, by an order in writing under the hands of the commissioners of his Majesty's customs, which order the said commissioners are hereby authorized and empowered to issue in manner aforesaid, if they shall see fit; and at every port where registry shall be made in pursuance of this act, a book shall be kept by the collector and comptroller, in which all the particulars contained in the form of the certificate of registry hereinbefore directed to be used shall be duly entered; and every registry shall be numbered in progression, beginning such progressive numeration at the commencement of each and every year; and such collector and comptroller shall forthwith, or within one month at the farthest, transmit to the commissioners of his Majesty's customs a true and exact copy, together with the number of every certificate which shall be by them so granted.

X. And be it further enacted, that every ship or vessel shall be deemed to belong to some port at or near to which some or one of the owners who shall take and subscribe the oath required by this act, before registry be made, shall reside; and whenever such owner or owners shall have transferred all his or their share or shares in such ship or vessel, the same shall be registered *de novo*, before such ship or vessel shall sail or depart from the port to which she shall then belong, or from any other port which shall be in the same part of the United Kingdom, or the same colony, plantation, island, or territory as the said port shall be in: provided always, that if the owner or owners of such ship or vessel cannot in sufficient time comply with the requisites of this act, so that registry may be made before it shall be necessary for such ship or vessel to sail or depart upon another voyage, it shall be lawful for the collector and comptroller of the port where such ship or vessel may then be, to certify upon the back of the existing certificate of Registry of such ship or vessel, that the same is to remain in force for the voyage upon which the said ship or

British ships captured, not to be again entitled to registry.

But ships condemned in Courts of Admiralty may be registered.

Ships shall be registered at the port to which they belong.

Commissioners of customs may permit registry at other ports.

Book of Registers to be kept.

Ports to which vessels shall be deemed to belong.

Change of subscribing owners to require registry *de novo*.

If registry *de novo* cannot be made, ship may go one voyage with permission indorsed on certificate of registry.

Form of oath.

‘ I *A. B.* of [place of residence and occupation] do make oath, that the ship or vessel [name] of [port or place], whereof [master’s name] is at present master, being [kind of built, burthen, et cetera, as described in the certificate of the surveying officer] was [when and where built, or if prize, capture and condemnation] and that I, the said *A. B.* [and the other owners’ names and occupations if any, and where they respectively reside; videlicet, town, place, or parish and county; or if member of and resident in any factory in foreign ports, or in any foreign town or city, being an agent for, or partner in any house or copartnership, actually carrying on trade in Great Britain or Ireland, the name of such factory, foreign town or city, and the names of such house or copartnership], am [or are] sole owner [or owners] of the said vessel, and that no other person or persons whatever hath or have any right, title, interest, share, or property therein or thereto; and that I the said *A. B.* [and the said other owners, if any], am [or are] truly and *bona fide* a subject [or subjects] of Great Britain; and that I the said *A. B.* have not, (nor have any of the other owners, to the best of my knowledge and belief), taken the oath of allegiance to any foreign state whatever, [except under the terms of some capitulation, describing the particulars thereof] or that since my taking [or his or their taking] the oath of allegiance to [naming the foreign states respectively to which he or any of the said owners shall have taken the same], I have [or he or they hath or have] become a denizen [or denizens, or naturalized subject or subjects, as the case may be] of the United Kingdom of Great Britain and Ireland, by his Majesty’s letters patent, or by an act of parliament, [naming the times when such letters of denization have been granted respectively, or the year or years in which such act or acts for naturalization have passed respectively]; and that no foreigner, directly or indirectly, hath any share or part interest in the said ship or vessel.’

XIII. And be it further enacted, that in case the required number of joint owners or proprietors of any ship or vessel shall not personally attend to take and subscribe the oath hereinbefore directed to be taken and subscribed, then and in such case such owner or owners, proprietor or proprietors, as shall personally attend, and take and subscribe the oath aforesaid, shall further make oath that the part owner or part owners of such ship or vessel then absent is or are not resident within twenty miles of such port or place, and hath or have not, to the best of his or their knowledge or belief, wilfully absented himself or themselves, in order to avoid the taking the oath hereinbefore directed to be taken and subscribed, or is or are prevented by illness from attending to take and subscribe the said oath.

Addition to oath in case the required number of owners do not attend.

XIV. And in order to enable the collector and comptroller of his Majesty’s customs to grant a certificate truly and accurately describing every ship or vessel to be registered in pursuance of this act, and also to enable all other officers of his Majesty’s customs, on due examination, to discover whether any such ship or vessel is the same with that for which a certificate is alleged to have been granted; be it enacted, that previous to the registering or granting of any certificate of registry as aforesaid, some one or more person or persons appointed by the commissioners of his Majesty’s customs, (taking to his or their assistance, if he or they shall judge it necessary, one or more person or persons skilled in the building and admeasurement of ships), shall go on board of every such ship or vessel as is to be registered, and shall strictly and accurately

Vessels to be surveyed previous to registry.

Certificate of
survey to be
given;

owner or mas-
ter consenting
therein.

Mode of ad-
measurement
to ascertain
tonnage.

Ascertaining
tonnage when
vessels are
afloat.

Engine room in
steam vessels to
be deducted.

Tonnage when
so ascertained,

examine and admeasure every such ship or vessel as to all and every particular contained in the Form of the Certificate hereinbefore directed, in the presence of the master, or of any other person who shall be appointed for that purpose on the part of the owner or owners, or, in his or their absence, by the said master, and shall deliver a true and just account in writing of all such particulars of the built, description, and admeasurement of every such ship or vessel as are specified in the form of the certificate above recited, to the collector and comptroller authorized as aforesaid to make such registry, and grant such certificate of registry; and the said master or other person attending on the part of the owner or owners is hereby required to sign his name also to the certificate of such surveying or examining officer in testimony of the truth thereof, provided such master or other person shall consent and agree to the several particulars set forth and described therein.

XV. And be it further enacted, that for the purpose of ascertaining the tonnage of ships or vessels, the rule for admeasurement shall be as follows; *viz*, the length shall be taken on a straight line along the rabbet of the keel from the back of the main stern-post to a perpendicular line from the fore part of the main stem under the bowsprit, from which, subtracting three-fifths of the breadth, the remainder shall be esteemed the just length of the keel to find the tonnage; and the breadth shall be taken from the outside of the outside plank in the broadest part of the ship, whether that shall be above or below the main wales, exclusive of all manner of doubling planks that may be wrought upon the sides of the ship; then multiplying the length of the keel by the breadth so taken, and that product by half the breadth, and dividing the whole by ninety-four, the quotient shall be deemed the true contents of the tonnage.

XVI. And whereas it would in some cases endanger ships or vessels, to cause them to be laid on shore; be it therefore enacted, that in cases where it may be necessary to ascertain the tonnage of any ship or vessel, when afloat, according to the foregoing rule, the following method shall be observed; that is to say, drop a plumb line over the stern of the ship, and measure the distance between such line and the after part of the stern post at the load water mark; then measure from the top of the plumb line, in a parallel direction with the water, to a perpendicular point immediately over the load water mark at the fore part of the main stem, subtracting from such measurement the above distance, the remainder will be the ship's extreme, from which is to be deducted three inches for every foot of the load draught of water for the rake abaft, also three-fifths of the ship's breadth for the rake forward, the remainder shall be esteemed the just length of the keel to find the tonnage; and the breadth shall be taken from outside to outside of the plank in the broadest part of the ship, whether that shall be above or below the main wales, exclusive of all manner of sheathing or doubling that may be wrought on the side of the ship; then multiplying the length of the keel for tonnage by the breadth so taken, and that product by half the breadth, and dividing by ninety-four, the quotient shall be deemed the true contents of the tonnage.

XVII. Provided always, and be it further enacted, that in each of the several rules hereinbefore prescribed, when used for the purpose of ascertaining the tonnage of any ship or vessel propelled by steam, the length of the engine-room shall be deducted from the whole length of such ship or vessel, and the remainder shall, for such purpose, be deemed the whole length of the same.

XVIII. And be it further enacted, That whenever the tonnage of any ship or vessel shall have been ascertained according to the rule herein

prescribed (except in the case of ships or vessels which have been admeasured afloat), such account of tonnage shall ever after be deemed the tonnage of such ship or vessel, and shall be repeated in every subsequent registry of such ship or vessel; unless it shall happen that any alteration has been made in the form and burthen of such ship or vessel, or it shall be discovered that the tonnage of such ship or vessel had been erroneously taken and computed.

XIX. And be it further enacted, that at the time of obtaining the certificate of Registry as aforesaid, sufficient security by bond shall be given to his Majesty, his heirs, and successors, by the master and such of the owners as shall personally attend as is hereinbefore required, such security to be approved of and taken by the person or persons hereinbefore authorized to make such registry, and grant such certificate of registry, at the port or place in which such certificate shall be granted; in the penalties following; that is to say, if such ship or vessel shall be a decked vessel, or be above the burthen of fifteen tons, and not exceeding fifty tons, in the penalty of one hundred pounds; if exceeding the burthen of fifty tons, and not exceeding one hundred tons, in the penalty of three hundred pounds; if exceeding the burthen of one hundred tons, and not exceeding two hundred tons, in the penalty of five hundred pounds; if exceeding the burthen of two hundred tons, and not exceeding three hundred tons, in the penalty of eight hundred pounds; and if exceeding the burthen of three hundred tons, in the penalty of one thousand pounds; and the condition of every such bond shall be, that such certificate shall not be sold, lent, or otherwise disposed of to any person or persons whatever, and that the same shall be solely made use of for the service of the ship or vessel for which it is granted; and that in case such ship or vessel shall be lost or taken by the enemy, burnt, or broken up, or otherwise prevented from returning to the port to which she belongs, or shall on any account have lost and forfeited the privileges of a British ship, or shall have been seized and legally condemned for illicit trading, or shall have been taken in execution for debt, and sold by due process of law, or shall have been sold to the crown, or shall, under any circumstances, have been registered *de novo*, the certificate, if preserved, shall be delivered up, within one month after the arrival of the master in any port or place in his Majesty's dominions, to the collector and comptroller of some port in Great Britain, or of the Isle of Man, or of the British plantations, or to the governor, lieutenant-governor, or commander-in-chief for the time being of the islands of Guernsey or Jersey; and that if any foreigner, or any person or persons for his use and benefit, shall purchase or otherwise become entitled to the whole or any part or share of or any interest in such ship or vessel, and the same shall be within the limits of any port of Great Britain, Guernsey, Jersey, Man, or the British colonies, plantations, islands, or territories aforesaid, then and in such case the certificate of registry shall, within seven days after such purchase or transfer of property in such ship or vessel, be delivered up to the person or persons hereinbefore authorized to make registry and grant certificate of registry at such port or place respectively as aforesaid; and if such ship or vessel shall be in any foreign port when such purchase or transfer of interest or property shall take place, then that the same shall be delivered up to the British consul or other chief British officer resident at or nearest to such foreign port; or if such ship or vessel shall be at sea when such purchase or transfer of interest or property shall take place, then that the same shall be delivered up to the British consul or other chief British officer at the foreign port or place in or at which the master or other person having

Bond to be given at the time of registry.

Conditions of the certificate shall be sole made use of for the service of the vessel, &c

or taking the charge or command of such ship or vessel shall first arrive after such purchase or transfer of property at sea, immediately after his arrival at such foreign port: but if such master or other person who had the command thereof at the time of such purchase or transfer of property at sea shall not arrive at a foreign port, but shall arrive at some port of Great Britain, Guernsey, Jersey, Man, or his Majesty's said colonies, plantations, islands, or territories, then that the same shall be delivered up in manner aforesaid, within fourteen days after the arrival of such ship or vessel, or of the person who had the command thereof, in any port of Great Britain, Guernsey, Jersey, Man, or any of his Majesty's said colonies, plantations, islands, or territories: provided always, that if it shall happen that at the time of registry of any ship or vessel, the same shall be at any other port than the port to which she belongs, so that the master of such ship or vessel cannot attend at the port of registry, to join with the owner or owners in such bond as aforesaid, it shall be lawful for him to give a separate bond to the like effect at the port where such ship or vessel may then be, and the collector and comptroller of such other port shall transmit such bond to the collector and comptroller of the port where such ship or vessel is to be registered; and such bond, and the bond also given by the owner or owners, shall together be of the same effect against the master and owner or owners, or either of them, as if they had bound themselves jointly and severally in one bond.

If ship, at the time of registry, be at any other port than that of registry, the master may there give bond.

When master is changed new master to give similar bond, and his name to be indorsed on certificate of registry.

XX. And be it further enacted, than when and so often as the master or other person having or taking the charge or command of any ship or vessel registered in manner hereinbefore directed shall be changed, the master or owner of such ship or vessel shall deliver to the person or persons hereinbefore authorized to make such registry and grant such certificates of registry at the port where such change shall take place, the certificate of registry belonging to such ship or vessel, who shall thereupon indorse and subscribe a memorandum of such change, and shall forthwith give notice of the same to the proper officer of the port or place where such ship or vessel was last registered pursuant to this act, who shall likewise make a memorandum of the same in the book of registers, which is hereby directed and required to be kept, and shall forthwith give notice thereof to the commissioners of his Majesty's customs: provided always, that before the name of such new master shall be indorsed on the certificate of registry, he shall be required to give and shall give a bond in the like penalties and under the same conditions as are contained in the bond hereinbefore required to be given at the time of registry of any ship or vessel.

Certificate of registry to be given up as directed by the bond.

XXI. And be it further enacted, that if any person whatever shall at any time have possession of, and wilfully detain, any certificate of registry granted under this or any other act, which ought to be delivered up to be cancelled, according to any of the conditions of the bond hereinbefore required to be given, upon the registry of any ship or vessel, such person is hereby required and enjoined to deliver up such certificate of registry, in manner directed by the conditions of such bond, in the respective cases, and under the respective penalties therein provided.

Name of vessel which has been registered never afterwards to be changed. Names to be painted on the stern.

XXII. And be it further enacted, that it shall not be lawful for any owner or owners of any ship or vessel to give any name to such ship or vessel, other than that by which she was first registered in pursuance of this or any other act; and that the owner or owners of all and every ship or vessel which shall be so registered, shall before such ship or vessel, after such registry, shall begin to take in any cargo, paint or cause to be painted, in white or yellow letters of a length not less than four inches,

upon a black ground, on some conspicuous part of the stern, the name by which such ship or vessel shall have been registered pursuant to this act, and the port to which she belongs, in a distinct and legible manner, and shall so keep and preserve the same; and that if such owner or owners, or master or other person having or taking the charge or command of such ship or vessel, shall permit such ship or vessel to begin to take in any cargo before the name of such ship or vessel has been so painted as aforesaid, or shall wilfully alter, erase, obliterate, or in anywise hide or conceal, or cause or procure or permit the same to be done (unless in the case of square-rigged vessels in time of war,) or shall in any written or printed paper, or other document, describe such ship or vessel by any name other than that by which she was first registered pursuant to this act, or shall verbally describe, or cause or procure or permit such ship or vessel to be described by any other name to any officer or officers of his Majesty's revenue in the due execution of his or their duty, then and in every such case such owner or owners, or master or other person having or taking the charge or command of such ship or vessel, shall forfeit the sum of one hundred pounds.

XXIII. And be it further enacted, that all and every person and persons who shall apply for a certificate of the registry of any ship or vessel, shall and they are hereby required to produce to the person or persons authorized to grant such certificate, a true and full account, under the hand of the builder of such ship or vessel, of the proper denomination, and of the time when, and the place where such ship or vessel was built; and also an exact account of the tonnage of such ship or vessel, together with the name of the first purchaser or purchasers thereof, (which account such builder is hereby directed and required to give under his hand, on the same being demanded by such person or persons so applying for a certificate as aforesaid); and shall also make oath before the person or persons hereinbefore authorized to grant such certificate (which oath he or they is or are hereby authorized to administer), that the ship or vessel for which such certificate is required, is the same with that which is so described by the builder as aforesaid.

XXIV. And be it further enacted, that if the certificate of registry of any ship or vessel shall be lost or mislaid, so that the same cannot be found or obtained for the use of such ship or vessel when needful, and proof thereof shall be made to the satisfaction of the commissioners of his Majesty's customs, such commissioners shall and may permit such ship or vessel to be registered *de novo*, and a certificate thereof to be granted: provided always, that if such ship or vessel be absent, and far distant from the port to which she belongs, or by reason of the absence of the owner or owners, or of any other impediment, registry of the same cannot then be made in sufficient time, such commissioners shall and may grant a licence for the present use of such ship or vessel, which licence shall for the time and to the extent specified therein, and no longer, be of the same force and virtue as a certificate of registry granted under this act; provided always, that before such registry *de novo* be made, the owner or owners and master shall give bond to the commissioners aforesaid, in such sum as to them shall seem fit, with a condition, that if the certificate of registry shall at any time afterwards be found, the same shall be forthwith delivered to the proper officers of his Majesty's customs to be cancelled, and that no illegal use has been or shall be made thereof, with his or their privity or knowledge; and further, that before any such licence shall be granted as aforesaid, the master of such ship or vessel shall also make oath that the same has been registered

Builder's certificate of particulars of ship.

Oath to be made thereto.

Certificate of registry lost or mislaid,

commissioners may permit registry *de novo*; or grant a licence.

Bond respecting lost certificate of registry. Condition.

Oath to be made before licence be granted.

Before licence
be granted,
ship to be sur-
veyed as if for
registry;

and registry
may be made
after departure
of the ship,

and certificate
transmitted to
be exchanged
for the licence.

Persons de-
taining certi-
ficate of regis-
try to forfeit
100*l*.

Justice to cer-
tify detainer,

as a British ship, naming the port where, and the time when such registry was made, and all the particulars contained in the certificate thereof, to the best of his knowledge and belief; and shall also give such bond, and with the same condition as is before-mentioned: provided also, that before any such licence shall be granted; such ship or vessel shall be surveyed in like manner as if a registry *de novo* were about to be made thereof, and the certificate of such survey shall be preserved by the collector and comptroller of the port to which such ship or vessel shall belong; and in virtue thereof it shall be lawful for the said commissioners, and they are hereby required to permit such ship or vessel to be registered after her departure, whenever the owner or owners shall personally attend to take and subscribe the oath required by this act before registry be made, and shall also comply with all other requisites of this act, except so far as relates to the bond to be given by the master of such ship or vessel; which certificate of registry the said commissioners shall and may transmit to the collector and comptroller of any other port, to be by them given to the master of such ship or vessel upon his giving such bond, and delivering up the licence which had been granted for the then present use of such ship or vessel.

XXV. And whereas it is not proper that any person under any pretence whatever should detain the certificate of registry of any ship or vessel, or hold the same for any purpose other than the lawful use and navigation of the ship or vessel for which it was granted; be it therefore enacted, that in case the master of any ship or vessel, or any other person who shall have received or obtained by any means, or for any purpose whatever, the certificate of the registry thereof, (whether such master or other person shall be a part owner or not) shall wilfully detain and refuse to deliver up the same to the proper officers of his Majesty's customs for the purposes of such ship or vessel as occasion shall require, it may and shall be lawful to and for any owner or owners of such ship or vessel, the certificate of registry of which shall be detained and refused to be delivered up as aforesaid, to make complaint on oath against the master of the ship or vessel, or other person who shall so detain and refuse to deliver up the same, of such detainer and refusal, to any justice of the peace residing near to the place where such detainer and refusal shall be in Great Britain or Ireland, or to any member of the supreme court of justice, or any justice of the peace in the islands of Jersey, Guernsey, or Man, or in any colony, plantation, island, or territory to his Majesty belonging, in Asia, Africa, or America, or Malta, Gibraltar, or Heligoland, where such detainer and refusal shall be in any of the places last-mentioned; and on such complaint, the said justice or other magistrate shall and is hereby required, by warrant under his hand and seal, to cause such master or other person to be brought before him, to be examined touching such detainer and refusal; and if it shall appear to the said justice or other magistrate, on examination of the master or other person, or otherwise, that the said certificate of registry is not lost or mislaid, but is wilfully detained by the said master or other person, such master or other person shall be thereof convicted, and shall forfeit and pay the sum of one hundred pounds, and on failure of payment thereof, he shall be committed to the common gaol, there to remain without bail or main-prize for such time as the said justice or other magistrate shall in his discretion deem proper, not being less than three months, nor more than twelve months; and the said justice or other magistrate shall and he is hereby required to certify the aforesaid detainer, refusal, and conviction to the person or persons who granted such certificate of registry for such

ship or vessel, who shall, on the terms and conditions of law being complied with, make registry of such ship or vessel *de novo*, and grant a certificate thereof, conformably to law, notifying on the back of such certificate the ground upon which the ship or vessel was so registered *de novo*; and if such master or other person who shall have detained and refused to deliver up such certificate of registry as aforesaid, or shall be verily believed to have detained the same, shall have absconded, so that the said warrant of the justice or other magistrate cannot be executed upon him, and proof thereof shall be made to the satisfaction of the commissioners of his Majesty's customs, it shall be lawful for the said commissioners to permit such ship or vessel to be registered *de novo*, or otherwise in their discretion to grant a licence for the present use of such ship or vessel, in like manner as is hereinbefore provided, in the case wherein the certificate of registry is lost or mislaid.

and ship to be registered *de novo*.

If person detaining certificate have absconded,

ship may be registered as in case of lost certificate.

XXVI. And be it further enacted, that if any ship or vessel, after she shall have been registered pursuant to the directions of this act, shall in any manner whatever be altered so as not to correspond with all the particulars contained in the certificate of her registry, in such case such ship or vessel shall be registered *de novo*, in manner hereinbefore required, as soon as she returns to the port to which she belongs, or to any other port which shall be in the same part of the United Kingdom, or in the same colony, plantation, island, or territory as the said port shall be in, on failure whereof such ship or vessel shall to all intents and purposes be considered and deemed and taken to be a ship or vessel not duly registered.

Ship altered in certain manner to be registered *de novo*.

XXVII. And be it further enacted, that the owner or owners of all such ships and vessels as shall be taken by any of his Majesty's ships or vessels of war, or by any private or other ship or vessel, and condemned as lawful prize in any Court of Admiralty, or of such ships or vessels as shall be condemned in any competent court for breach of the laws for the prevention of the slave trade, shall, upon registering such ship or vessel, before he or they shall obtain such certificate as aforesaid, produce to the proper officers of his Majesty's customs a certificate of the condemnation of such ship or vessel, under the hand and seal of the judge of the court in which such ship or vessel shall have been condemned (which certificate such judge is hereby authorized and required to grant), and also a true and exact account in writing of all the particulars contained in the certificate hereinbefore set forth, to be made and subscribed by one or more skilful person or persons, to be appointed by the court then and there to survey such ship or vessel, and shall also make oath before the said officer (which he is hereby authorized and required to administer), that such ship or vessel is the same vessel which is mentioned in the certificate of the judge aforesaid.

Vessels condemned as prize;

or for breach of laws against slave trade;

certificate of condemnation to be produced,

XXVIII. Provided always, and be it further enacted, that no ship or vessel which shall be taken and condemned as prize in any court of Admiralty as aforesaid, or other competent court, shall be registered in the islands of Guernsey, Jersey, or the Isle of Man, although belonging to his Majesty's subjects residing in those islands, or in some one or other of them: but the same shall be registered either at Southampton, Weymouth, Exeter, Plymouth, Falmouth, Liverpool, or Whitehaven, by the collector and comptroller at such ports respectively; who are hereby authorized and required to register such ship or vessel, and to grant a certificate thereof, in the form and under the regulations and restrictions in this act contained.

Prize vessels not to be registered at Guernsey, Jersey, or Man.

Where to be registered.

XXIX. And be it further enacted, that when and so often as the pro- Transfers of

Interest to be made by bill of sale.

Reciting certificate of registry.

Bill of sale not void by error of recital, &c.

Property in ships to be divided into sixty-four parts or shares.

Oath upon first registry to state the number of such shares held by each owner.

Smaller portions may be conveyed without stamp.

Joint stock companies.

Only thirty-two persons to be owners at one time.

Not to affect the equitable title of heirs, &c.

erty in any ship or vessel, or any part thereof, belonging to any of his Majesty's subjects, shall, after registry thereof, be sold to any other or others of his Majesty's subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, of the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity: provided always, that no bill of sale shall be deemed void by reason of any error in such recital or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel therein intended be effectually proved thereby.

XXX. And be it further enacted, that the property in every ship or vessel of which there are more than one owner, shall be taken and considered to be divided into sixty-four parts or shares; and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares; and that no person shall be entitled to be registered as an owner of any ship or vessel, in respect of any proportion of such ship or vessel, which shall not be an integral sixty-fourth part or share of the same: provided always, that upon the first registry of any ship or vessel, after the said thirty-first day of December one thousand eight hundred and twenty-three, the owner or owners who shall take and subscribe the oath required by this act before registry be made, shall also declare upon oath the number of such parts or shares then held by each owner, and the same shall be so registered accordingly: provided always, that if it shall at any time happen that the property of any owner or owners in any ship or vessel cannot be reduced by division into any number of integral sixty-fourth parts or shares, it shall and may be lawful for the owner or owners of such fractional parts as shall be over above such number of integral sixty-fourth parts or shares, into which such property in any ship or vessel can be reduced by division, to transfer the same one to another, or jointly, to any new owner, by memorandum upon their respective bills of sale, or by fresh bill of sale, without such transfer being liable to any stamp duty: provided also, that the right of such owner or owners to such fractional parts, shall not be affected by reason of the same not having been registered: provided also, that it shall be lawful for any number of such owners named and described in such registry, being partners in any house or copartnership actually carrying on trade in any part of his Majesty's dominions, to hold any ship or vessel, or any share or shares of any ship or vessel in the name of such house or copartnership as joint owners thereof, without distinguishing the proportionate interest of each of such owners; and that such ship or vessel, or the share or shares thereof so held in copartnership, shall be deemed and taken to be partnership property to all intents and purposes, and shall be governed by the same rules, both in law and equity, as relate to and govern all other partnership property in any other goods, chattels, and effects whatsoever.

XXXI. And be it further enacted, that no greater number than thirty-two persons shall be entitled to be the legal owners at one and the same time of any ship or vessel, as tenants in common, or to be registered as such: provided always, that nothing herein contained shall affect the equitable title of minors, heirs, legatees, creditors, or others, exceeding that number, duly represented by or holding from any of the persons within the said number, registered as legal owners of any share or shares of such ship or vessel: provided also, that if it shall be proved to the satisfaction of the commissioners of his Majesty's customs that any number of

persons have associated themselves as a joint stock company, for the purpose of owning any ship or vessel, or any number of ships or vessels, as the joint property of such company, and that such company have duly elected or appointed any number not less than three of the members of the same to be trustees of the property in such ship or vessel, or ships or vessels so owned by such company, it shall be lawful for such trustees, or any three of them, with the permission of such commissioners, to take the oath required by this act before registry be made, except that instead of stating therein the names and descriptions of the other owners, they shall state the name and description of the company to which such ship or vessel, or ships or vessels, shall in such manner belong: provided also, that if it shall become necessary to register any ship or vessel, or ships or vessels, belonging to any corporate body in the United Kingdom, the oath required by this act to be taken before registry be made, shall be taken by the secretary or other proper officer of such corporate body, who shall in such oath declare the name and description of such corporate body, instead of the names and descriptions of the owners of such ship or vessel.

Trustees may apply to have registry made.

Corporate bodies.

XXXII. And be it further enacted, that whenever any ship or vessel, which shall have been registered before the said thirty-first day of December one thousand eight hundred and twenty-three, shall be registered *de novo*, the number of such shares held by each owner shall be registered as far as the same be practicable; and to that intent the owner or owners who shall take and subscribe the oath required by this act before registry be made, shall produce the bills of sale or other titles of themselves and of the other owners, in order that the number of such shares held by each of them may be ascertained and registered accordingly; and if the registry of such ship or vessel then in force shall be the first registry, and the shares of any of the owners shall remain the same as they were at the time of such registry, and the owner or owners or any one of them who shall attend to take and subscribe the oath required by this act, before registry be made, shall be the same as was or were the owner or owners, or one of them, who took and subscribed such oath before such first registry was made, such original owner or owners, instead of producing the bills of sale, shall declare upon oath, to the best of his or their knowledge and belief, the number of such shares held by him or them, and by any other original owner or owners, whose proportionate property in such ship or vessel shall have remained unchanged: provided always, that if at the time of such registry *de novo*, such owner or owners shall make oath, that he and they and each of them are unable to produce the bill or bills of sale, or to give any certain account or proof of the share or shares of the other previous owners, or some or any one of them, it shall be lawful for the collector and comptroller to register such ship or vessel, without requiring the share or shares of such owner or owners to be declared and specified.

Shares to be registered on registry *de novo* under this act.

If shares of owners cannot be ascertained, registry for that time may be made without stating them.

XXXIII. Provided also, and be it further enacted, that from and after the expiration of two years from the said thirty-first day of December one thousand eight hundred and twenty-three, or from and after the first arrival and entry of any ship or vessel, after the expiration of such two years, at the port to which she belongs, or at any other port which shall be in the same part of the United Kingdom, or in the same colony, plantation, island, or territory as the said port shall be in, no certificate of registry shall be in force, except such as shall be granted under the authority of this act, and in which the share or shares hereinbefore described held by each owner shall be set forth; unless it shall be certified thereon by the collector and comptroller of the port to which such ship or

Within two years all vessels and shares must be registered;

unless commissioners give further time.

particulars of any bill of sale or other instrument, by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale or instrument purporting to be a transfer by the same vendor or mortgagor, or vendors or mortgagors, of the same ship or vessel, share or shares thereof to any other person or persons, unless thirty days shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry; or in case the ship or vessel was absent from the port to which she belonged at the time when the particulars of such former bill of sale or other instrument were entered in the book of registry, then unless thirty days shall have elapsed from the day on which the ship or vessel arrived at the port to which the same belonged; and in case the particulars of two or more such bills of sale or other instruments as aforesaid, shall at any time have been entered in the book of registry of the said ship or vessel, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale or other instrument as aforesaid, unless thirty days shall in like manner have elapsed from the day on which the particulars of the last of such bills of sale or other instrument were entered in the books of registry, or from the day on which the ship or vessel arrived at the port to which she belonged, in case of her absence as aforesaid; and in every case where there shall at any time happen to be two or more transfers by the same owner or owners of the same property, in any ship or vessel entered in the book of registry as aforesaid, the collector and comptroller are hereby required to indorse upon the certificate of registry of such ship or vessel, the particulars of that bill of sale or other instrument under which the person or persons claims or claim property; who shall produce the certificate of registry for that purpose within thirty days next after the entry of his said bill of sale or other instrument in the book of registry as aforesaid, or within thirty days next after the return of the said ship or vessel to the port to which she belongs, in case of her absence at the time of such entry as aforesaid; and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector and comptroller, and they are hereby required to indorse upon the certificate of registry the particulars of the bill of sale or other instrument to such person or persons as shall first produce the certificate of registry for that purpose, it being the true intent and meaning of this act that the several purchasers and mortgagees of such ship or vessel, share or shares thereof, when more than one appear to claim the same property, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid: provided always, that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, so that the indorsement cannot, in due time, be made thereon, and proof thereof shall be made by the purchaser or mortgagee, or his known agent, to the satisfaction of the commissioners of his Majesty's customs, it shall be lawful for the said commissioners to grant such further time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said ship or vessel, under the provisions of this act; and thereupon the collector and comptroller shall make a

sale has been entered for any shares thirty days shall be allowed for indorsing the certificate of registry, before any other bill of sale for the same shall be entered.

Provision in case certificate be mislaid.

the same upon such trials were dispensed with ; be it therefore enacted, that the collector and comptroller of his Majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any person or persons whomsoever, produce and exhibit for his, her, or their inspection and examination, any oath or affidavit taken or sworn by any such owner or owners, proprietor or proprietors, and also any register or entry in any book or books of registry required by this act to be made or kept relative to any ship or vessel, and shall upon every reasonable request by any person or persons whomsoever, permit him, her, or them to take a copy or copies, or an extract or extracts thereof respectively, and that the copy or copies of any such oath or affidavit, register or entry, shall, upon being proved to be a true copy or copies thereof respectively, be allowed and received as evidence upon every trial at law, without the production of the original or originals, and without the testimony or attendance of any collector or comptroller, or other person or persons acting for them respectively, in all cases, as fully and to all intents and purposes as such original or originals, if produced by any collector or collectors, comptroller or comptrollers, or other person or persons acting for them, could or might legally be admitted or received in evidence.

XLII. And be it further enacted, that if the ship or vessel, or the share or shares of any owner thereof, who may be out of the kingdom, shall be sold in his absence by his known agent or correspondent, under his directions either expressed or implied, and acting for his interest in that behalf, and such agent or correspondent who shall have executed a bill of sale to the purchaser of the whole of such ship or vessel, or of any share or shares thereof, shall not have received a legal power to execute the same, it shall be lawful for the commissioners of his Majesty's customs, upon application made to them, and proof to their satisfaction of the fair dealings of the parties, to permit such transfer to be registered, if registry *de novo* be necessary, or to be recorded and indorsed, as the case may be, in manner directed by this act, as if such legal power had been produced ; and if it shall happen that any bill of sale cannot be produced, or if, by reason of distance of time or the absence or death of parties concerned, it cannot be proved that a bill of sale for any share or shares in any ship or vessel had been executed, and registry *de novo* of such ship or vessel shall have become necessary, it shall be lawful for the commissioners of his Majesty's customs, upon proof to their satisfaction of the fair dealings of the parties, to permit such ship or vessel to be registered *de novo*, in like manner as if a bill of sale for the transfer of such share or shares had been produced : provided always, that in any of the cases herein mentioned, good and sufficient security shall be given to produce a legal power or bill of sale, within a reasonable time, or to abide the future claims of the absent owner, his heirs and successors, as the case may be ; and at the future request of the party whose property has been so transferred, without the production of a bill of sale from him or from his lawful attorney, such bond shall be available for the protection of his interest, in addition to any powers or rights which he may have in law or equity against the ship or vessel, or against the parties concerned, until he shall have received full indemnity for any loss or injury sustained by him.

XLIII. And be it further enacted, that when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage or of assignment to a trustee or trustees, for the purpose of selling the same

Vessels or shares sold in the absence of owners without formal powers.

Commissioners may permit record of such sales or registry *de novo*, as the case may require ; and in other cases where bills of sale cannot be produced ;

security being given to produce legal powers, or abide future claims.

Transfer by way of mortgage &c.

Mortgagee not to be deemed an owner.

Transfers of ships for security of debts being registered, rights of mortgagee not affected by any act of bankruptcy of mortgagor, &c.

Commissioners in Scotland, &c. to transmit copies of certificates to commissioners in England.

Governors may cause proceedings in suits to be stayed.

for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered, shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise, for the payment of the debt or debts for securing the payment of which such transfer shall have been made.

XLIV. And be it further enacted, that when any transfer of any ship or vessel, or of any share or shares thereof, shall have been made as a security for the payment of any debt or debts, either by way of mortgage or of assignment as aforesaid, and such transfer shall have been duly registered according to the provisions of this act, the right or interest of the mortgagee or other assignee as aforesaid, shall not be in any manner affected by any act or acts of bankruptcy committed by such mortgagor or assignor, mortgagors or assignors, after the time when such mortgage or assignment shall have been so registered as aforesaid, notwithstanding such mortgagor or assignor, mortgagors or assignors, at the time he or they shall so become bankrupt as aforesaid, shall have in his or their possession, order, and disposition, and shall be the reputed owner or owners of the said ship or vessel or the share or shares thereof, so by him or them mortgaged or assigned as aforesaid; but that such mortgage or other assignment shall take place of and be preferred to any right, claim, or interest, which may belong to the assignee or assignees of such bankrupt or bankrupts in such ship or vessel, share or shares thereof, any law or statute to the contrary thereof notwithstanding.

XLV. And be it also further enacted, that the commissioners of his Majesty's customs in Scotland and Ireland respectively shall transmit, at the end of every month in each year, to the commissioners of his Majesty's customs in England, true and exact copies of all such certificates as shall be granted by them, or by any officer or officers within the limits of their commission, in pursuance of this act.

XLVI. And be it further enacted, that it shall and may be lawful for any governor, lieutenant-governor, or commander in chief of any of his Majesty's colonies, plantations, islands, or territories, and they are hereby respectively authorized and required, if any suit, information, libel, or other prosecution or proceeding of any nature or kind whatever, shall have been commenced, or shall hereafter be commenced, in any court whatever in any of the said colonies, plantations, islands, or territories respectively touching the force and effect of any register, granted to any ship or vessel upon a representation made to any such governor, lieutenant-governor, or commander in chief, to cause all proceedings thereon to be stayed if he shall see just cause so to do, until his Majesty's pleasure shall be known and certified to him by his Majesty, by and with the advice of his Majesty's privy council; and such governor, lieutenant-governor, or commander in chief, is hereby required to transmit to one

of his Majesty's principal secretaries of state, to be laid before his Majesty in council, an authenticated copy of the proceedings in every such case, together with his reasons for causing the same to be stayed, and such documents, (properly verified) as he may judge necessary for the information of his Majesty.

XLVII. And be it further enacted, that if any person or persons shall falsely make oath to any of the matters hereinbefore required to be so verified, such person or persons shall suffer the like pains and penalties as are incurred by persons committing wilful and corrupt perjury; and that if any person or persons shall counterfeit, erase, alter, or falsify any certificate or other instrument in writing, required or directed to be obtained, granted, or produced by this act, or shall knowingly or wilfully make use of any certificate or other instrument so counterfeited, erased, altered, or falsified, or shall wilfully grant such certificate, or other instrument in writing, knowing it to be false, such person or persons shall, for every such offence, forfeit the sum of five hundred pounds.

Punishing persons making false oath;

or falsifying any document.

XLVIII. And be it further enacted, that all the penalties and forfeitures inflicted and incurred by this act, shall and may be sued for, prosecuted, and recovered in such courts, and be disposed of in such manner, and by such ways, means and methods, as any penalties or forfeitures inflicted, or which may be incurred for any offence committed against the laws of customs, may now legally be sued for, prosecuted, recovered, and disposed of; and that the officer or officers concerned in seizures or prosecutions under this act, shall be entitled to and receive the same share of the produce arising from such seizures, as in the case of seizures for unlawful importation, and to such share of the produce arising from any pecuniary fine or penalty for any offence against this act, as any officer or officers is or are now by any law or regulation entitled to upon prosecutions for pecuniary penalties.

How penalties are to be recovered,

and officers' shares.

XLIX. And be it further enacted, that this act may be altered, varied, or repealed by any act or acts to be passed in this session of parliament.

in or upon or to the said goods, wares, or merchandize, or any bill of lading for the delivery thereof, than was possessed, or could or might have been enforced by the said consignee or consignees at the time of such deposit or pledge as a security as aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess, and enforce such right, title, or interest, as was possessed, and might have been enforced, by such consignee or consignees, at the time of such deposit or pledge as aforesaid; any rule of law, usage or custom to the contrary notwithstanding.

III. Provided always, that nothing herein contained shall be deemed, construed, or taken to deprive or prevent the true owner or owners, proprietor or proprietors of such goods, wares, or merchandize, from demanding and recovering the same from his, her, or their factor or factors, agent or agents, before the same shall have been so deposited or pledged, or from the assignee or assignees of such factor or factors, agent or agents, in the event of his, her, or their bankruptcy; nor to prevent any such owner or owners, proprietor or proprietors, from demanding or recovering of and from any person or persons, or of or from the assignees of any person or persons in case of his or her bankruptcy, or of or from any body or bodies politic or corporate, such goods, wares or merchandize, so consigned, deposited, or pledged, upon repayment of the money, or on restoration of the negotiable security or securities, or on payment of a sum of money equal to the amount of such security or securities, for which money or negotiable security or securities such person or persons, his, her, or their assignee or assignees, or such body or bodies politic or corporate, may be entitled to any lien upon such goods, wares, or merchandize: nor to prevent the said owner or owners, proprietor or proprietors, from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his, her, or their hands as the produce of the sale of such goods, wares, or merchandize, after deducting thereout the amount of the money or negotiable security or securities so advanced or given upon the security thereof as aforesaid: provided always, that in case of the bankruptcy of such factor or agent, the owner of the goods so pledged and redeemed as aforesaid shall be held to have discharged *pro tanto* the debt due by him to the bankrupt's estate.

Right of the true owner to follow his goods while in the hands of his agent, or of his assignees in case of bankruptcy, or to recover them from assignees, &c. upon paying his advances secured upon them, &c.

become due thereupon, at or before the expiration of *ninety* days after the safe arrival of the said ship *Exeter* at her moorings in the river *Thames*; or, in case of the loss of the said ship *Exeter*, such an average as by custom shall have become due on the salvage; then this obligation to be void and of no effect, otherwise to remain in full force and virtue. Having signed to three bonds of the same tenor and date, the one of which being accomplished, the other two to be void and of no effect.

A. B. for self } *L. S.*
and *C. D.* }

Signed, sealed, and delivered,)
where no stamped paper is) *G. H.*
to be had, in the presence) *I. K.*
of

No. II.

Form of a Bottomry Bill.

To all men to whom these presents shall come I, *A. B.*, of *Bengal*, mariner, part-owner and master of the ship called the *Exeter*, of the burthen of five hundred tons, and upwards, now riding at anchor in *Table-Bay*, at the *Cape of Good Hope*, send greeting.

Whereas, I, the said *A. B.*, part-owner and master of the aforesaid ship called the *Exeter*, now in prosecution of a voyage from *Bengal* to the port of *London*, having put into *Table-Bay* for the purpose of procuring provision and other supplies necessary for the continuation and performance of the voyage aforesaid, am at this time necessitated to take up, upon the adventure of the said ship called the *Exeter*, the sum of one thousand pounds, sterling monies of Great Britain, for setting the said ship to sea, and furnishing her with provisions and necessaries for the said voyage; which sum *C. D.*, of the *Cape of Good Hope*, master attendant, hath at my request lent unto me, and supplied me with at the rate of twelve hundred and twenty pounds sterling for the said one thousand pounds, being at the rate of one hundred and twenty-two pounds for every hundred pounds advances as aforesaid, during the voyage of the said ship from *Table-Bay* to *London*. Now know ye, that I, the said *A. B.*, by these presents, do, for me, my executors and administrators, covenant and grant to and with the said *C. D.*, that the said ship shall, with the first convoy which shall offer for *England* after the date of these presents, sail and depart for the port of *London*, there to finish the voyage aforesaid. And I the said *A. B.*, in consideration of the sum of one thousand pounds sterling to me in hand, paid by the said *C. D.*, at and before the sealing and delivery of these presents, do hereby bind myself, my heirs, executors, and administrators, my goods and chattels, and particularly the said ship, the tackle, and apparel of the same, and also the freight of the said ship, which is or shall become due for the aforesaid voyage from *Bengal* to the port of *London*, to pay unto the said *C. D.*, his executors, administrators, or assigns, the sum of twelve hundred and

of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, and in the year of our Lord 1801.

Whereas the above named Hans Busk has, on the day of the date above written, advanced and lent unto the said James Peter Fearon, and Peter Douglas, the sum of seven hundred and fifty pounds, upon the goods and merchandizes, and effects laden and to be laden on board the good ship or vessel called the Belvidere, of the burthen of nine hundred and eighty-seven tons or thereabouts, now riding at anchor in the river of Thames, outward bound to China, and whereof James Peter Fearon is commander, by his acceptance of a bill of exchange to that amount at four months' date for the account of them the said James Peter Fearon, and Peter Douglas; Now the condition of this obligation is such, that if the said ship or vessel do and shall with all convenient speed proceed and sail from and out of the said river of Thames, on a voyage to any port or place, ports or places in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, and from thence do and shall sail, return, and come back into the said river of Thames, at or before the end and expiration of thirty-six calendar months, to be accounted from the day of the date above written, and there to end her said intended voyage, (the dangers and casualties of the seas excepted;) and if the said James Peter Fearon and Peter Douglas, or either of them, their or either of their heirs, executors, or administrators, do and shall, within thirty days next after the said ship or vessel shall be arrived at her moorings in the said river of Thames, from her said intended voyage, or at or upon the end and expiration of the said thirty-six calendar months, to be accounted as aforesaid, (which of the said times shall first and next happen,) well and truly pay or cause to be paid unto the said Hans Busk, his executors, administrators, or assigns, the full sum of one thousand and twenty pounds of lawful money of Great Britain, together with thirteen pounds ten shillings of like money per calendar month for each and every calendar month, and so proportionably for a greater or lesser time than a calendar month, for all such time, and so many calendar months, as shall be elapsed and run out of the said thirty-six calendar months over and above twenty calendar months, to be accounted from the day of the date above written; or if in the said voyage, and within the said thirty-six calendar months, to be accounted as aforesaid, an utter loss of the said ship or vessel by fire, enemies, men of war, or any other casualties, shall unavoidably happen, and the said James Peter Fearon, and Peter Douglas, their heirs, executors, or administrators, do and shall within six calendar months next after such loss well and truly account for (upon oath if required,) and pay unto the said Hans Busk, his executors, administrators, or assigns, a just and proportionable average on all the goods and effects of the said James Peter Fearon carried from England on board the said ship or vessel, and the net proceeds thereof, and on all other goods and effects which the said James Peter Fearon shall acquire during the said voyage for or by reason of such goods, merchandizes, and effects, and which shall not be unavoidably lost, then the above written obligation to be void, and of none effect, else to stand in full force and virtue.

Manoel Eugenio Coetho, who together with the parties signed thereto ; **I, Joge de Almeida Rorig**, the notary wrote it ; **Jacomo Mazzola**, **Andrew Bellucci**, **Joav Pedro Rocks**, **Manoel Eugenio Caetho** ; and **J. Joge de Almeida Rorig**, notary public of notes in the city of Lisbon and its district of His Royal Highness the Prince Regent our Lord, whom God preserve, caused this instrument to be transcribed from my book of notes, to which I refer myself, and have subscribed it, and signed it in public form.

Francis Manoel Calvert.

{ In testimony of the truth, Joge de Almeida Rorig, whose handwriting is certified by Francis Arbouin, Vice-Consul.

No. V.

Stipulation for the return of a Ship.

MARY ANN.

12th January, 1824.

ON which day Bogg exhibited as proctor, and made himself a party for George Goodwin Hope, master of the said ship Mary Ann ; and produced for sureties Josiah Culmer, of Wapping High Street, mathematical instrument maker, and James Powell, of the same place, undertaker, who, submitting themselves to the jurisdiction of this Court, bound themselves, their heirs, executors, and administrators, for the said George Goodwin Hope, in the sum of six hundred and eighty-four pounds of lawful money of Great Britain, being double the appraised value of two eighth parts of the said ship, unto William Fennings, of Rood-lane, Fenchurch street, London, merchant, and Philip Fennings, of Harwich, in the county of Essex, owners of the said two eighth parts or shares of the said ship, for the return of the said ship, to the amount of the shares of the said William Fennings and Philip Fennings ; and unless they shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum aforementioned ; which caution the said surrogate received on the report of John Crickett, marshal of this Court, as to the sufficiency of the said sureties ; and at the petition of Bogg, decreed the said ship to be released from the arrest.

Present,

BEDFORD.

and C. D. of London, merchant, freighter of the said ship or vessel, of the other part, witnesseth, that the said owner [or master] for the considerations hereinafter-mentioned, hath granted, and to freight letten, and by these presents doth grant and to freight let, unto the said merchant, (who hath accordingly hired and taken to freight, and by these presents doth hire and take to freight,) the said ship or vessel for the voyages, and upon the terms and conditions following, (that is to say) The owner of the said ship or vessel [or the said master] shall and will forthwith render the said ship or vessel tight, staunch, strong, properly rigged, sufficiently manned, and in every respect fit for navigation, and to perform the outward and homeward voyages hereinafter-mentioned; and shall thereupon with all convenient speed receive on board, load, and stow in a regular and proper manner all such goods and merchandises as shall or may be sent by the said freighter alongside the said ship or vessel in the said port of London, not exceeding what the said ship or vessel can conveniently and safely carry over sea, besides her provisions, tackle, and appurtenances, (the master's cabin and the usual and necessary room for the ship's crew excepted) and being so laden, and being also despatched, the said master shall and will, with the then first favourable wind and opportunity, set sail and depart without delay in the said ship or vessel from the said port of London, and proceed with the next convoy to the port of ———, and upon his arrival there address himself to the agents or correspondents of the said freighter; and, as soon after as may be, make discharge, and right and true delivery of the said goods and merchandises unto the agents, correspondents, or assigns of the said freighter, according to the bills of lading, and so to the end of the said outward voyage. And, after delivery of the said outward cargo as aforesaid, the said master shall and will forthwith render the said ship or vessel in all respects fit to receive her homeward cargo, and perform her homeward voyage. And the said master shall and will thereupon, with all convenient speed, receive on board, load, and stow in a regular and proper manner all such goods and merchandises as shall and may be sent alongside the said ship or vessel, at the said port of ———, by the said freighter, his correspondents or agents, not exceeding what the said vessel can conveniently and safely carry over sea (besides and except as hereinbefore-mentioned and excepted); and being so laden, and being also again despatched, the said master shall and will with the then first favourable wind and opportunity without delay, set sail and depart from the said last-mentioned port in the said ship or vessel, and proceed therewith direct to the said port of London; and, upon arrival in the London Docks, make discharge and right and true delivery of the said homeward cargo, unto the said freighter or his order, according to the bills of lading; and so end the said homeward voyage, (the acts of God and the King's enemies, the dangers and accidents of the seas, rivers, and navigation, the restraints and detentions of kings, princes, rulers, and republics, and all and every other unavoidable dangers and accidents, excepted). And the owner [or master] for himself his executors and administrators, doth hereby covenant, promise, and agree, to and with the said freighter, his executors and administrators, that the said master shall not, nor will, in either the said outward or homeward voyage, take or load on board, or suffer to be taken or loaden on board the said ship or vessel, any goods, merchandises, packets, letters, or parcels whatever, from any other person or persons whomsoever, other than the said freighter, without his consent and permission, or the consent and permission of his agents, correspondents, or assigns in writing for

Fitting the ship, for her outward voyage.

Loading the goods.

Sailing of the ship.

Delivery of the outward cargo.

Refitting for the homeward voyage.

Loading of homeward cargo.

Sailing on homeward voyage.

Delivery of the homeward cargo.

Exceptions.

Master's covenant not to take any goods, &c. but freighters.

that purpose, first had and obtained. And the said freighter for himself, his executors and administrators, doth hereby covenant, promise, and agree to and with the said master, his executors and administrators, that he the said freighter shall and will procure, and cause to be sent alongside the said ship or vessel, to be loaded on board thereof, such outward and homeward cargoes as aforesaid, and procure the necessary licences for the same. And also, that he shall and will well and truly pay or cause to be paid unto the said owner, [or master,] his executors or administrators, the sum of £——, in full for the freight of the said outward cargo, upon the right and true delivery thereof; and the sum of £——, in full for the freight of the said homeward cargo, upon the right and true delivery thereof as aforesaid. And which said sums of money shall be in entire satisfaction, and in lieu of all primeage and average, pilotage, and port charges whatever, for the said outward and homeward voyages. And it is hereby covenanted and agreed, by and between the said parties, that the said merchant shall be allowed ——— lay or running days in the whole, for loading and unloading the said outward and homeward cargoes, to commence and be computed from and exclusive of the days after the said master shall be ready to take in and discharge his said respective cargoes, and notice given thereof to the freighter, his agents, correspondents, or assigns. And it is further agreed by and between the said parties, that it shall be lawful for the said freighter, or his agents, correspondents, or assigns, to keep and detain the said ship or vessel on demurrage, for the space of ——— working days, over and above the before-mentioned running or lay days, upon paying the said master, his executors or administrators, at the rate of £—— sterling per day, for each and every of the said ——— days of demurrage. And it is hereby further mutually covenanted and agreed by and between the said parties that the said freighter shall be at liberty to place and send on board the said vessel a supercargo during the said voyages, for whose passage the said master shall make no charge whatever (the said supercargo, however, finding and providing himself in all necessaries during the said voyages); and for the due performance of all and singular the covenants, conditions, and agreements herein contained, the said parties mutually bind themselves, their executors and administrators, in the penal sum of £—— firmly by these presents. In witness whereof the said parties have hereunto set their hands and seals in London the day first above written.

A. B. (L.S.)
C. D. (L.S.)

Signed, sealed, and delivered,
being first duly stamped in
the presence of E. F. }

No. VIII.

The Form of a Bill of Lading.

N. B. shipped, in good order, and well conditioned, by *A. B.*, merchant, in and upon the good ship called ———, whereof *C. D.* is master, now in the river Thames, and bound for ——— the goods following, viz. [*here describe the goods*] marked and numbered as per margin, to be delivered in the like good order and condition at ——— aforesaid, (the acts of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever excepted,) unto the said *A. B.*, or his assigns, he or they paying freight for the said goods at the rate of ——— *per* ———, with primage and average accustomed. In witness whereof I the said master, of the said ship, have affirmed to three bills of lading of this tenor and date; any one of which bills being accomplished, the other two are to be void.

Bill of lading.

Exception.

Rate of freight, &c.

Dated at London, this ——— day of ———, 1824.
C. D.

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